(19)

No. 91-155-CFX
Status: GRANTED

Title: International Society for Krishna Consciousness, Inc., and Brian Rumbaugh, Petitioners
v.
Walter Lee

Docketed:
July 24, 1991

Court: United States Court of Appeals for the Second Circuit

Vide:
91-339

Counsel for petitioner: Fisher,Barry A.

Counsel for respondent: Berg,Arthur P.

Ptn mailed July 24; recd July 25, 1991

Entry	Date	Note	Proceedings and Orders
1	Jul 24 1991	G	Petition for writ of certiorari filed.
2	Aug 28 1991		DISTRIBUTED. September 30, 1991
3	Sep 9 1991	P	Response requested -- WHR. (Due October 9, 1991)
4	Oct 8 1991		Brief of respondent Walter Lee, Superintendent of Port Authority Police in opposition filed. VIDED.
5	Oct 9 1991		REDISTRIBUTED. November 1, 1991
6	Nov 26 1991		REDISTRIBUTED. December 13, 1991
8	Jan 3 1992		REDISTRIBUTED. January 10, 1992
9	Jan 10 1992		Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.
			**********
32	Feb 5 1992		SET FOR ATGUMENT WEDNESDAY, MARCH 25, 1992. (1ST CASE).
33	Feb 5 1992		(A91-613) Application of respondent/cross petitioner for further extension of time to file brief on the merits until March10, 1992.
21	Feb 6 1992	P	Application (A91-569) extension of time within which to file brief on the merits, submitted to Justice Thomas.
26	Feb 7 1992		(A91-569) Time to file petitioner's brief on the merits is extended to and including February 17, 1992. The brief and joint appendix are to be filed with the Clerk of this Court and served upon respondent no later than 3 p.m. that day.
10	Feb 10 1992		Brief amici curiae of ACLU, et al. filed. VIDED.
27	Feb 10 1992		(A91-569) AMENDED ORDER. It is ordered, sua sponte, that the time to file petitioners brief on the merits is extended to and including February 18, 1992. The brief and joint appendix are to be filed with the Clerk of this Court and served upon respondent no later than 3 p.m. that day.
11	Feb 13 1992		Record filed.
		*	Certified proceedings and briefs U.S. Court of Appeals for the Second Circuit.

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No. 91-155-CFX

Entry	Date	Note	Proceedings and Orders
13	Feb 13 1992	G	Motion of Multimedia Newspaper Company, et al. for leave to file a brief as amici curiae filed.
12	Feb 14 1992		Brief amici curiae of Project Vote, et al. filed. VIDED.
15	Feb 14 1992		Joint appendix filed. VIDED.
		*	Joint Appendix received in two volumes
17	Feb 14 1992		Brief amici curiae of American Tract Society, et al. filed. VIDED.
18	Feb 14 1992		Brief amici curiae of American Newspaper Publishers, et al. filed. VIDED.
19	Feb 14 1992		Brief amici curiae of American Jewish Congress, et al. filed. VIDED.
14	Feb 18 1992		Brief of petitioners International Society for Krishna Consciousness, et al. filed. VIDED.
16	Feb 18 1992	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
20	Feb 18 1992		Brief amicus curiae of Free Congress Foundation filed. VIDED.
22	Feb 21 1992		CIRCULATED.
23	Feb 21 1992	G	Application (A91-613) of respondent/cross petitioner for extension of time within which to file brief on the merits, submitted to Justice Thomas.
24	Feb 24 1992		Application (A91-613) granted by Justice Thomas extending the time to file until March 9, 1992.
25	Feb 24 1992		(A91-613) The brief is to be filed with the Clerk of this Court and served upon respondent no later than 3 p.m. that day.
28	Feb 24 1992		(A91-613) Opposition to respondent/cross petitioner's request for extension of time to file brief on the merits filed on behalf of International Society for Krishna Consciousness
29	Feb 27 1992		Record filed.
		*	Original proceedings U.S. District Court, Southern District of New York (2 Boxes)
30	Mar 2 1992		Motion of Multimedia Newspaper Company, et al. for leave to file a brief as amici curiae GRANTED.
31	Mar 2 1992		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
39	Mar 4 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED.
34	Mar 5 1992		(A91-613) Application of cross respondent/petitioner for further extension of time to file brief on the merits until March 10, 1992, submitted to Justice Thomas.
35	Mar 6 1992		(A91-613) Application requesting further extension of time to file brief on the merits granted by Justice Thomas. Time extended to and including March 10, 1992. The brief is tobe filed with the Clerk of this Court and served upon petitioners/cross respondents no later than 3 p.m. that day.
38	Mar 9 1992		Record filed.

No. 91-155-CFX

Entry	Date	Note	Proceedings and Orders
		*	LODGING by Airports Association Council International, amicus curiae. 9 copies of report.
40	Mar 9 1992		Brief amicus curiae of National Institute of Municipal Law Officers filed. VIDED.
44	Mar 9 1992	X	Brief amicus curiae of Airports Association Council International-North America filed. VIDED.
37	Mar 10 1992	X	Brief of respondent Walter Lee, Superintendent of Port Authority Police filed. VIDED.
41	Mar 12 1992	P	Application (A91-683) of petitioners for a one day extension of time to file a reply brief on the merits from 3/18/92 to 3/19/92, submitted to Justice Thomas.
42	Mar 12 1992	D	Motion of petitioners /cross-respondents to strike amici curiae brief of Airports Association Council International-North America filed.
43	Mar 13 1992		(A91-683) Application for extension of time to file petitioners' brief on the merits is extended to and including March 19, 1992. The reply brief is to be filed with the Clerk of this Court and served upon respondent no later than 3 p.m. that day.
45	Mar 19 1992		Reply brief of petitioners International Society for Krishna Consciousness, et al. filed. VIDED.
46	Mar 23 1992		Motion of petitioners /cross-respondents to strike amici curiae brief of Airports Association Council International-North America DENIED.
47	Mar 25 1992		ARGUED.

No. 91-1155

Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,

Petitioners,

v.

WALTER LEE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

DAVID M. LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Avenue, Suite 1776
New York, New York 10001
(212) 807-9733

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the solicitation of contributions for a religious cause may be prohibited from the public concourses of the New York City airports.

2. Whether the Court of Appeals for the Second Circuit erred in finding, in conflict with decisions of the District of Columbia, Fifth, Seventh, Eighth, and Ninth Circuits, that public corridors of airports are not "public forums" presumptively available for free speech, including solicitation of contributions for religious groups.

3. Whether the public areas of airports, the counterpart of a city's gates, should be closed to the full panoply of expression, so as to insulate the travelling public from speech that, at worst, might cause them momentary delay and, at best, cause people to think, to support political or religious causes, or to change their views.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The International Society for Krishna Consciousness, Inc., and Brian Rumbaugh petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 925 F.2d 576. The opinion and order of the district court, App. 29, is reported at 721 F. Supp. 572. The Magistrate's Report and Recommendation, App. 49, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1991, and a petition for rehearing was denied and suggestion for rehearing en banc declined on April 25, 1991. App. 74. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fourteenth Amendment to the United States Constitution, section 1, provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

3. Chapter III, Part B Rules and Regulations of the Port Authority of New York and New Jersey, as amended, provides, in part, as follows:

> B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.[1]

STATEMENT

The petitioners, the International Society for Krishna Consciousness, Inc., a not-for-profit New York

[1] The full text of the Regulation is set forth at App. 78.

corporation,[2] and Brian Rumbaugh (collectively ISKCON), one of its members, espouse the theological and missionary views of the Krishna Consciousness religion, "an outgrowth of the Chaitanya movement of Bengal." *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 433 (2d Cir. 1981). Krishna Consciousness was brought to America in 1965 by His Divine Grace A.C. Bhaktivedanta Swami Prabhupada (Srila Prabhupada), a scholar and teacher who translated and wrote over 100 books, including a translation and edition of the *Bhagavad-gita*, the 25-volume *Srimad Bhagavatam*, and 17 volumes of *Sri Caitanya Caritamrta*.

In accordance with the central importance of scripture to the religion, Srila Prabhupada instructed his disciples to disseminate the written teachings as widely as possible. Thus, devotees are required to venture into public places for the purposes of chanting the names of God, proselytizing members of the public, distributing religious literature, and soliciting support for the religion. Called *sankirtan* in Sanskrit, this activity lies at the core of Krishna Consciousness and is its very lifeblood.

At the time this lawsuit was filed, the respondent, Walter Lee, was the Superintendent of the Port Authority of New York and New Jersey (Port Authority) Police, the official charged with enforcement of airport regulations.[3] The Port Authority itself was created in 1921 by interstate

[2] ISKCON has no parent or subsidiary.

[3] Mr. Lee has since died. An acting superintendent, Charles E. Newman, is presently serving. Since a permanent replacement has not been appointed, petitioners continue to designate Mr. Lee as the respondent. *See* Sup. Ct. R. 35.3.

compact, N.Y. Unconsol. Laws §§ 6401-6423 (McKinney 1979 & Supp. 1991); N.J. Stat. Ann. §§ 32:1-1 to -24 (West 1990 & Supp. 1991), and is operated for the benefit of the people of the two states, N.Y. Unconsol. Laws § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35.4 (West 1990). Among its other functions, the Port Authority operates John F. Kennedy (JFK), La Guardia and Newark Airports under long-term ground leases with the states of New York and New Jersey, which own the airports.

All three airports contain many and varied public facilities, much like a self-contained city. The airports encompass restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, bookstores, newsstands, seating areas, advertising displays, public information stations, dental offices, private clubs – even a branch of Bloomingdale's. *See* Joint Appendix 224-25 (Newark), 225-26 (JFK), 231-32 (La Guardia).[4]

The three New York area airports make up the busiest airport complex in the world. Supplemental Appendix 96.[5] In 1986, the airports served 78,846,000 passengers – 7.8 percent of the entire domestic market, and 54.4 percent of the trans-Atlantic market. SA 54. By the end of the

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[4] Joint Appendix (hereinafter JA) refers to the Joint Appendix filed in the court of appeals.

[5] Supplemental Appendix (hereinafter SA) refers to the Supplemental Appendix filed in the court of appeals.

century, this number is expected to increase to more than 110 million passengers a year, *id.*, a figure which does not include "meeters and greeters."

The action was filed on October 25, 1975. On the same day, ISKCON sought a temporary restraining order and a preliminary injunction against enforcement of Port Authority regulations, N.Y. Admin. Code tit. 21, §§ 1260.13-.15 (1973), that required a license as a condition of the exercise of speech at the three airports. On January 19, 1976, the Port Authority and then Superintendent Lee filed a motion to dismiss, which, together with plaintiffs' motion for preliminary injunction, was heard on February 20, 1976, and decided on January 14, 1977. *International Soc'y for Krishna Consciousness v. New York Port Auth.*, 425 F. Supp. 681 (S.D.N.Y. 1977).

Judge Carter held Mr. Lee in as a defendant, but dismissed the Port Authority. The court, although agreeing that the challenged regulations were unconstitutional on their face, *id.* at 687, denied a preliminary injunction, holding that the airlines that leased space from the Port were indispensable parties. *Id.* at 686.

After the airlines were joined, on November 8, 1979, twenty-eight of them moved to dismiss the complaint, claiming that the prohibition of expressive activities in the areas of the airports they leased was not "state action," and ISKCON renewed its request for a preliminary injunction.

On July 23, 1982, Judge Lowe, to whom the case had been transferred, denied both motions. As to the motion to dismiss, the court held that the requisite state action existed. Memorandum Opinion and Order (July 23, 1982)

at 46-55. The court denied the preliminary injunction motion as "moot" on the ground that the Port Authority had stated that the particular regulations challenged did not apply to non-commercial activity. *Id.* at 58.

On April 20, 1983, the district court certified pursuant to 28 U.S.C. § 1292(b) the airlines' interlocutory appeal of the denial of their motion to dismiss. The court of appeals granted leave to appeal, but, after argument, vacated the permission and remanded the case with instructions that "gaps" in the "record" be filled. *International Soc'y for Krishna Consciousness v. Air Can.*, 727 F.2d 253, 255 (2d Cir. 1984).

Following discovery, the airlines again moved to dismiss. On June 1, 1987, Magistrate Dolinger filed a Report and Recommendation again concluding that the motions should be denied.

On November 11, 1987, plaintiffs moved for summary judgment, or, in the alternative, for a preliminary injunction, on both the state action and public forum issues. The airlines entered into a settlement agreement with which they were dismissed from the case, mooting the state action question. *See* JA 319-20.

The Port Authority, however, continued to claim the right to prohibit the distribution of religious literature and solicitation of donations in the terminal areas under its exclusive control. On February 11, 1988, the Port Authority promulgated a resolution codifying this policy. Under the regulation, the "continuous or repetitive" sale or distribution of literature and solicitation of donations is prohibited in the terminals. App. 84.

Arguments were presented before Magistrate Dolinger on March 25, 1988. Based upon the Port's representation that during the litigation plaintiffs would be permitted to continue the distribution of religious literature and solicitation of donations in the interior terminal areas, *see* JA 283, plaintiffs conditionally withdrew their request for preliminary injunction. *Id.* at 21, JA 298.

On October 25, 1988, Magistrate Dolinger recommended that ISKCON's motion for summary judgment be granted. The magistrate held that petitioners "are entitled to a declaration that the general circulation areas of the passenger terminals directly controlled by the Port Authority at the JFK International, La Guardia, and Newark International Airports are public fora, and that a total prohibition against leafletting and solicitation within these buildings is inconsistent with the requirements of the first amendment." App. 72. The magistrate found that the

> interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please." . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (quoting *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988)).

The Port Authority objected to the Magistrate's Report. JA 354. On September 15, 1989, the district court issued an Order and Opinion adopting the magistrate's recommendation and granting summary judgment for petitioners. Applying *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the court found the general circulation areas of the airport terminals to "possess the characteristics of a bustling metropolitan boulevard," App. 40, 721 F. Supp. at 576, and to be "the functional equivalent of public streets." App. 41, 721 F. Supp. at 577. The court agreed that "the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." App. 47, 721 F. Supp. at 579.

The court of appeals affirmed in part and reversed in part. Although the divided panel noted that it had initially been inclined to affirm the judgment in its entirety, it concluded that the intervening opinion in *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (No. 88-2031), had "altered public forum analysis." App. 10, 925 F.2d at 580.

The majority believed that "[u]ntil *Kokinda*," streets and sidewalks were treated as traditional public fora without a "detailed analysis of their particular purposes."[6] App. 11, 925 F.2d at 580. *Kokinda*, the court thought, wrought a sea-change, under which a forum's "purpose" is dispositive. App. 13-14, 925 F.2d at 582. It

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[6] "Given this approach," the court found "the district court's reliance on the visual and other similarities between the terminals' passageways and a 'bustling metropolitan boulevard' . . . understandable." App. 11, 925 F.2d at 581.

read *Kokinda* as entailing that when the "particular purpose of a place" is such that "the public uses [it] as a matter of necessity, or at least great convenience," the "in-person solicitation of funds" may be banned. *Id.* The court, however, counted at least five *Kokinda* votes as requiring that in-person literature distribution be allowed in the same place. *Id.* It accordingly reversed "insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirm[ed] insofar as it invalidated the Port Authority's ban on the distribution of literature." App. 3, 925 F.2d at 577.

Chief Judge Oakes dissented because he "believe[ed] that *Kokinda* is neither controlling nor a substantial deviation from the Court's public forum analysis." App. 17, 925 F.2d at 583. While recognizing that "the purposes of a forum are highly relevant to the traditional public forum inquiry," App. 18, 925 F.2d at 583, he asserted "that a forum's purpose alone can[not] dictate its status." *Id.* According to the dissent, if this were the case, then "[v]irtually all Government owned property" that "has an ostensible 'purpose' other than the promotion of free speech, assembly, and debate," *id.* would be unavailable for the exercise of First Amendment rights. Public forum analysis, the dissent maintained, turns not solely upon a forum's purpose, but rather upon a myriad of factors, all discussed in *Kokinda*, including the forum's location, the degree of access which the public has to the forum, and whether the forum in question has traditionally been used for expressive purposes. App. 20, 925 F.2d at 584. Applying these factors, Judge Oakes would have found the airport terminals to be "traditional public fora." App. 26, 925 F.2d at 586.

Three judges dissented from the denial of rehearing en banc. *See* App. 75, 925 F.2d at 587 (opinion of Oakes, C.J., joined by Newman & Cardamone, J.J.). The dissenters wished, first, to avoid a circuit conflict; second, "to clarify our court's understanding" of *Kokinda*; and third, "to reconsider the panel's conclusion that a forum's purpose alone can determine its public or non-public forum status." App. 75-76, 925 F.2d at 587. "[T]hat the Supreme Court is sure to grant certiorari," was not, for the dissenters, a sufficient basis on which to deny rehearing before the full circuit bench. App. 77, 925 F.2d at 588.

REASONS FOR GRANTING THE PETITION

When filed in 1975, this case was one of just a trickle of challenges to governmental restrictions on First Amendment activities in airport terminals. By the time it was decided on appeal sixteen years later, the status of airport terminals as a public forum was one of the most profusely litigated issues in the annals of public forum jurisprudence – resulting in near-universal recognition that First Amendment activities must be permitted in such facilities.[7]

[7] Reported court of appeals decisions include *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *International Soc'y for Krishna Consciousness v. Rochford*, 508 F.2d 263 (7th Cir. 1978); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th

(Continued on following page)

The court of appeals was initially inclined to follow this "unusual consensus of judicial, legislative, and administrative opinion." *U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983).[8] The court believed, however, that *Kokinda* required a dramatic departure from this otherwise settled law.

This Court has granted review of the airport public forum issue once before, although it was not necessary to decide, *see Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), and at least two members of the Court felt at that time that the issue "should not have [been] postponed . . . for another day." *Id.* at 577 (White, J., joined by Rehnquist, C.J., concurring).

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Cir. 1981); *U.S. S.W. African/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd*, 482 U.S. 569 (1987); *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

Reported district court opinions include *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); *International Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977); *International Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Tex. 1977); *International Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. La. 1978); *International Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978).

[8] The Federal Aviation Administration, in promulgating regulations for solicitation and literature distribution at National and Dulles Airports, *see* 14 C.F.R. §§ 159.93-.94 (1991), recognized that the airports' concourses and walkways are "in many respects . . . like another public thoroughfare," 45 Fed. Reg. 34,314 (1980).

The status of airport terminals as public fora is an issue with far-reaching constitutional implications. Apart from the sharp legal and logistical conflict created amongst the circuits on the airport issue, expressive rights at other places deemed analogous to urban streets, parks and sidewalks may also be affected by the court of appeals' approach. These facilities include urban bus terminals,[9] public buildings,[10] national monuments,[11] public stadia,[12] and highway rest areas.[13]

Review is necessary also to clarify the court of appeals' interpretation of *Kokinda*. Contrary to the court of appeals' suggestion, public forum analysis is neither stagnant nor dogmatic; rather, it is diverse and evolving, and relies not upon a single, dispositive factor, such as "purpose," but upon a variety of relevant factors which ensure that the expression of views is not restricted to such inordinately expensive mediums as television and newspapers, but remain accessible to citizens of all

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[9] *See, e.g. Wolin v. Port of N. Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[10] *See, e.g., United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *International Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *International Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Tex. 1978).

[11] *See, e.g. United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979).

[12] *See, e.g. Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991).

[13] *See, e.g. International Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

political and religious persuasions and economic and social strata.

I. THE COURT OF APPEALS' DECISION HAS CREATED A CLEAR-CUT CONFLICT IN THE COURTS OF APPEALS OVER THE IMPORTANT QUESTION WHETHER AIRPORT TERMINALS ARE A PUBLIC FORUM.

As the panel majority noted, "[t]he 'well-established' authority in other circuits . . . is that airport terminals are traditional public fora for speech activites." App. 10, 925 F.2d at 580. It forthrightly recognized that its decision "creat[ed] . . . a circuit conflict" over the "considerable weight of unanimous authority." *Id.* The three judges who dissented from the denial of rehearing en banc agreed, urging that "rehearing is necessary to avoid a clear-cut conflict. . . . " App. 75, 925 F.2d at 587.

The observations of all the judges below who looked at the question are of course correct. The Eighth Circuit, for example, reported in 1987 that "every court that has decided the issue has held that an airport is a public forum," *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).[14]

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[14] A later, unreviewed district court case, *International Caucus of Labor Committees v. Metropolitan Dade County, Fla.*, 724 F. Supp. 917 (S.D. Fla. 1989), although labeling Miami International Airport "a nonpublic forum," *id.* at 925, did not have occasion to consider a complete ban on a protected form of expression. Rather, the airport sought only to regulate First Amendment activities through time, place and manner regulations such as "designated first amendment areas," and the "use

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In *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975), for example, the court observed that O'Hare Airport's "spacious, city-owned common areas . . . resemble those public thoroughfares which have long been recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information." *Id.* at 925.

Similarly, in holding the interior terminal areas of the Dallas/Fort Worth Airport to be a public forum, the court in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. Unit A. Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), found "[t]he parallel between public streets and the crescent-shaped concourses of the D/FW terminal buildings, where air travellers as well as the general public may shop, drink, imbibe, and sightsee," to be "clear and powerful." *Id.* at 627.

In *U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States*, the court commented that the open areas of National and Dulles airports resembled a "fair-sized municipality," 708 F.2d at 764, where "[r]oughly eighteen million people pass through the concourses and walkways each year, enjoying the benefits of restaurants and snack bars, two post offices, various specialty shops, two medical stations, at least five bars, a barber shop, drug stores, banks, newsstands, and police stations." *Id.* The

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of tables and semi-fixed signs *in* the first amendment zones," *id.* at 919 (emphasis added). The court emphasized that a ban on expression was "a far cry" from the regulations before it. *Id.* at 930.

court thus concluded that "the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *Id.*

The two most recent circuit court decisions[15] have reached identical results. The Ninth Circuit concurred with the reasoning in *Chicago Area Military Project* in finding Los Angeles airport to be a "public thoroughfare." *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 784 F.2d 791, 794 (9th Cir. 1986), *aff'd*, 482 U.S. 569 (1987). And, the Eighth Circuit

> agree[d] . . . that the concourse of a large airport facility like the one in St. Louis has the character, pattern of activity, and nature of purpose that make it an appropriate place for the communication of views. *See Wolin*, 392 F.2d at 89. As has been noted, an airport terminal is much like a busy city street. Both are lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please.

Jamison, 828 F.2d at 1283.

The judicial recognition that transportation terminals are public thoroughfares appropriate for expression did not begin with airports. One of the earlier cases had no difficulty concluding that Union Station in Los Angeles, "a spacious area open to the community as a center for a rail transportation," is "like a public street or park." *In re*

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[15] Both decisions post-date this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Hoffman, 67 Cal.2d 845, 847, 851, 434 P.2d 353, 354, 356, 64 Cal. Rptr. 97, 98, 100 (1967).

Similarly, in holding the concourses of the Port Authority bus terminal in Manhattan an appropriate place for the exercise of First Amendment rights, the court in *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), observed that

> the character and function of the Terminal, makes clear that it is a thoroughfare used by thousands of people each day. It is one of the busiest passageways in the country, with persons hurrying to and from subways, buses, shops, theaters, and other streets. In design and physical appearance, the main concourse resembles a street. The fifty foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others . . . The terminal, with its many adjuncts, becomes something of a small city – but built indoors.

Id. at 89.

The five courts of appeals and numerous other courts that have held airport terminals to be public fora have recognized the essential role these facilities play in the lives of the communities which they serve, and in the national and international circulation of people, goods, and ideas. The petition should be granted to reaffirm that the right to speak in these places may not be broadly denied.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO CLARIFY THE IMPACT OF *KOKINDA* ON PUBLIC FORUM ANALYSIS.

Certiorari should also be granted so that the Court can clarify its recent holding in *Kokinda*. The majority below believed that *Kokinda* "has altered public forum analysis" by shifting the focus from a fact-intensive approach to one based exclusively on the "purpose" of a particular facility. While Justice O'Connor, writing for the plurality in *Kokinda*, said that "[t]he mere physical characteristics of the property cannot dictate forum analysis," 110 S. Ct. at 3120, the Court also gave considerable weight to the particular physical characteristics of the post office sidewalks at issue. They did "not have the characteristics of public sidewalks traditionally open to expressive activities" *id*, and were "not . . . a thoroughfare." *Id.*

Here, in contrast, airport terminals are clearly public thoroughfares, "an interface between modes of transportation, a medium from ground to air." E. Blankenship, *The Airport* 28 (1974) [hereinafter Blankenship]. "[B]us and train terminals and airports are the streets of modernity." Note, *Public Forum Analysis After* Perry Education Association v. Perry Local Educators' Association – *A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 Fordham L. Rev. 545, 557 (1986).

Kokinda placed considerable weight on the fact that, in operating a postal service, the government acts in a "proprietory capacity." 110 S. Ct. at 3119. The decision below never considers whether airports are, similarly,

proprietory governmental operations. Although an airport generates revenue for the government, so do some parks and streets. The fact that revenue is generated, or the manner in which a particular facility is funded, should not be sufficient to end further public forum analysis. A post office and a municipal transit system are examples of the government *engaged* in commerce. At an airport, on the other hand, the government does not operate the airlines or the numerous shops, restaurants and other facilities found there. Instead, at an airport, the government merely *aids* commerce, rather than engaging in it. A city's streets and sidewalks serve to facilitate commerce – people use them to get to privately operated businesses.

Similarly, the public portions of an airport serve as an aid to commerce, as a passageway used by the public on their way to airlines and stores. Thus, unlike the postal sidewalk in *Kokinda*, the New York terminals "facilitate the daily commerce and life of the . . . city." *Kokinda*, 110 S.Ct. at 3120.

Justice Kennedy's concurrence also rejects any singular "purpose" test. "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." 110 S. Ct. at 3115 (Kennedy, J., concurring). Thus, while an airport may primarily accommodate a particular class of patrons – air travellers – its *activities* are numerous and varied.

Standard principles of modern airport planning and design recognize this reality, and thus dictate that passenger terminals contain appurtenances and services identical to those in urban commercial areas, including

"lobbies . . . office space, concessions, newsstands, restaurants, and government . . . management facilities." Blankenship at 28. Retail establishments in particular "are currently one of the most active areas of change in the airport facility . . . Products are no longer limited to typical newsstand and fast food items. Gourmet dining, up-scale apparel shops, and specialty foods . . . are becoming commonplace." G. Doughty, *Review of Passenger Service Issues at Airports*, in *Airports for People: Proceedings of the 8th World Airport Conference Organized by the Institution of Civil Engineers* 9 (1988).

The New York airports match this description. The International Arrivals Building at JFK, for example, is "equipped with all the conveniences one expects to find in a modern city." R. Allen, *Great Airports of the World* 73 (1964). Replete with pedestrian walkways, seating areas, bars, restaurants, newsstands, gift shops, a post office, advertising displays, book stores, insurance and car rental outlets, and even a retail Bloomingdale's, the terminal mirrors the immense urban agglomerate which it serves. Thus, a citizen who uses an airport terminal, as one who uses a street or sidewalk, as a forum for the dissemination of religious or political views, is not "making an anomalous use of it"; he or she is not "out of place" nor "out of order." Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 12.

For this reason, Judge Oakes appropriately observed that it is "considerably less than certain that if the post office building in *Kokinda* had also included the vast array of shops, restaurants, and service centers characteristic of Kennedy, La Guardia, and Newark Airports that even four Justices would have found that the sidewalk outside

was not a traditional public forum." App. 24, 925 F.2d at 585.

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE SOLICITATION OF FUNDS, A FULLY PROTECTED FORM OF FIRST AMENDMENT EXPRESSION, COULD BE PROHIBITED BASED ON UNSUBSTANTIATED AND UNJUSTIFIED FEARS OF DISRUPTION.

The Second Circuit approved a ban on face-to-face solicitation because of its supposed disruptive effects. While acknowledging that airports may be

> particularly useful to those seeking to solicit funds . . . when the particular purpose is such that the public uses them as a matter of necessity, or at least great convenience, we read the plurality [*Kokinda*] opinion to allow the prohibition of in-person solicitation of funds to prevent disruption of that public. Justice Kennedy reaches the same result because he believes that a prohibition on the in-person solicitation of funds is a legitimate time, place and manner restriction.

App. 14, 925 F.2d at 582.

The court below did not give sufficient weight to the fact that solicitation of funds "is a recognized form of speech protected by the First Amendment." *Kokinda*, 110 S. Ct. at 3118.[16] This is particularly true when the

[16] "Our prior cases teach that the solicitation of charitable contributions is protected speech." *Riley v. National Federation of the Blind*, 487 U.S. 781, 789 (1988); "Charitable solicitation of funds has been recognized by this court as a form of protected speech." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985).

solicitations are conducted "to support speech." *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718, 720 (2d Cir. 1984).

In *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) for example, the Court noted that face-to-face encounters for noncommercial donations provide "a greater opportunity for the exchange of ideas and the propagation of views than is available" in other forms of solicitation such as mail appeals. *Id.* at 798. By approaching members of the public one-on-one, ISKCON solicitors have the opportunity to discuss ideas, to give away books, and to solicit donations to support their cause. Thus, ISKCON's efforts are not the mere importuning of members of the public to give aid, but a reasoned discussion that includes a request for support.

No doubt, "a religous organization needs funds to remain a going concern." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). ISKCON members do not sell their literature[17] for a fixed price, nor is there a direct relationship between the cost of the book and the donation received. It is obvious, however, that petitioners must buy the books they distribute. The court of appeals' opinion allowing the distribution of literature, but prohibiting the solicitation of donations, deprives petitioners of the very resources necessary to pay for the books which they distribute.

There is also no basis for the fear that the airport "facility might be disrupted by such solicitation." App.

[17] ISKCON members primarily distribute religious books as opposed to leaflets or handbills.

14, 925 F.2d at 582. Petitioners have repeatedly made clear that they do not seek access to "any private offices, ticket counters or lines, check-in areas, baggage claims areas or lines, or exclusively leased waiting areas. . . . On the contrary, ISKCON members seek to conduct their activities *only* in areas of general circulation, including corridors, lobbies, and areas which are bordered by shops, restaurants, lounges and other commercial establishments unrelated to air transportation." Declaration of Brian Rumbaugh In Opposition To Defendants' Motion To Dismiss ¶ 6, at 4 (Aug. 14, 1985); JA 155. Thus, in the sixteen years that this case has been pending, respondents have yet to report a single instance of a traveller missing a flight, failing to make arrangements for ticketing or ground transportation, or missing a meeting or appointment because of petitioners' activities.

It simply cannot be shown, therefore, that face-to-face solicitations of donations in the general circulation areas of an airport terminal are disruptive of airport operations. The Port Authority regulations do not prohibit proselytizing or speechmaking, which might attract crowds and disrupt pedestrian traffic flow as much as a person making a donation to a colporteur. Literature distribution, permitted under the court of appeals' decision, might well be as disruptive to a traveller "hurrying to catch a plane or to arrange ground transportation" App. 14, 925 F.2d at 582, as a request for a voluntary donation. All entail some ephemeral degree of inconvenience to the traveller which is properly addressed not by a total ban on all First Amendment activities in an otherwise appropriate forum, but by the implementation of

reasonable time, place and manner regulations,[18] such as those that have worked flawlessly in the New York airports for the last sixteen years.

The Port Authority's "undifferentiated fear or apprehension" *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) of pedestrian traffic congestion, therefore, "is not enough to overcome the right to freedom of expression" *id.*, and is not relevant to public forum analysis.

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[18] *See, e.g., Fernandes*, 663 F.2d at 626 ("That the passageways are crowded does not defeat this conclusion [that the terminals are a public forum]; rather, such factors go to the reasonableness of the time, place, and manner restrictions imposed on persons exercising First Amendment rights in the forum."); *Wolke*, 453 F. Supp. at 874 ("Crowded conditions may require restrictions to ensure the efficient operation of the airport. But the conditions cannot support the sweeping prohibitions of free speech implicit in finding that the airport is not a public forum."); *cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding "booth rule" in Minnesota State Fairgrounds as time, place and manner regulation to control, in large part, pedestrian congestion); *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979) (upholding "booth rule" in Atlanta airport as place and manner regulation to control pedestrian traffic congestion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

DAVID M. LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Avenue, Suite 1776
New York, New York 10001
(212) 807-9733

July 24, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1082 – August Term, 1989
(Argued: March 27, 1990 Decided: February 8, 1991)
Docket No. 89-9182

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members,

Plaintiffs-Appellees,

-v.-

WALTER LEE, Superintendent of Port Authority Police,

Defendant-Appellant.

Before:

OAKES, *Chief Judge,*
WINTER and MINER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Mary Johnson Lowe, *Judge*) finding that portions of several Port Authority airport terminals are traditional public fora for First Amendment purposes and enjoining the enforcement of Port Authority regulations prohibiting the in-person solicitation of contributions and the distribution of literature within the terminals. We reverse as to the in-

person solicitation of funds but affirm as to the distribution of literature.

Affirmed in part, reversed in part. Chief Judge Oakes dissents in a separate opinion.

ARTHUR P. BERG, New York, New York (Joseph Lesser, Philip A. Maurer, Arnold D. Kolikoff, New York, New York, of counsel), *for Defendant-Appellant.*

BARRY A. FISHER, Los Angeles, California (David Grosz, Robert C. Moest, Fleishman, Fisher & Moest, David M. Liberman, Los Angeles, California; Jeremiah S. Gutman, Eugene N. Harley, Levy, Gutman, Goldberg & Kaplan, New York, New York, of counsel), *for Plaintiffs-Appellees.*

Arthur Eisenberg, Michael Simon, New York, New York, *for Amicus Curiae New York Civil Liberties Union.*

WINTER, *Circuit Judge:*

Appellant Walter Lee, now deceased, was the official responsible for enforcing a regulation of the Port Authority of New York and New Jersey, the party controlling the defense in the instant matter,[1] banning the solicitation of money and distribution of literature within the terminals of three New York area airports. The district court struck

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[1] The district court dismissed the Port Authority as a defendant in 1977 pursuant to *Monroe v. Pape*, 364 U.S. 167 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

down the regulation on the grounds that "the terminals . . . possess the characteristics of a bustling metropolitan boulevard" and are traditional public fora for expressive activity. After the district court's decision, the Supreme Court decided *United States v. Kokinda*, 110 S. Ct. 3115 (1990), which we believe dictates reversal insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirmance insofar as it invalidated the Port Authority's ban on the distribution of literature.

BACKGROUND

This action for declaratory and injunctive relief under 42 U.S.C. § 1983 began in 1975. After several detours described in the district court opinion, *see International Society for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572, 573-74 (S.D.N.Y. 1989), that court entered summary judgment in favor of the International Society for Krishna Consciousness, Inc. ("ISKCON").

The essential facts are not contested. ISKCON is a not-for-profit religious corporation whose members perform a ritual known as *sankirtan*. The ritual consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." While the distribution or sale of religious literature is a major part of the ritual, its primary purpose appears to be fundraising. ISKCON states, for example, that donations received through *sankirtan*, "including those received for religious literature, not only defray printing and other distribution costs, but are the very lifeblood and principal means of support of [the] religious movement."

The Port Authority was created by an interstate compact between New York and New Jersey. It owns or operates some thirty-three facilities within the Port District. Among these are the three airport terminals at issue in the present case, John F. Kennedy International Airport ("Kennedy"), La Guardia Airport ("La Guardia"), and Newark International Airport ("Newark"). Together, these airports constitute one of the busiest and most heavily used metropolitan airport complexes in the world. In 1986, they served nearly 79 million travelers, approximately eight percent of the domestic airline market and more than half of the Trans-Atlantic market. By the latter part of this decade, it is estimated that they will serve at least 110 million passengers per year.

Most of the space at Kennedy, La Guardia and Newark is leased to commercial airlines, each of which bears primary responsibility for its own leasehold. The Port Authority retains control over the unleased portions of the airports – specifically, parts of the International Arrivals Building at Kennedy, the Central Terminal Building at La Guardia, and the North Terminal Building at Newark. Initially, ISKCON challenged restrictions on *sankirtan* in both leased and unleased portions of the airports, but after a series of legal skirmishes over the need to join various commercial airlines as defendants and, once joined, over their status as state actors, the portion of the litigation involving the airlines was settled. The instant appeal thus pertains only to those unleased portions of Kennedy, La Guardia and Newark – to which we refer for convenience as "terminals" – subject to the Port Authority's direct control.

The public has access to the terminals, which contain various commercial establishments. At the time of ISKCON's submissions to the district court on the summary judgment motion, for example, the lobby of the International Arrivals Building at Kennedy included two restaurants, two snack stands, a bar, a postal substation and postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, two currency exchange facilities, a dental office, and an area for the display of art exhibits. Along the east and west corridors of that same building were some ten duty-free shops, five bars, two snack stands, a telegraph office, two bookstores, two newsstands, a bank, four travel insurance facilities, two currency exchanges, two cookie and candy shops, a cash and traveler's check machine, an India store, and a boutique-sized Bloomingdale's. Similar establishments lined the lobbies and corridors of both the Central Terminal Building at La Guardia and the North Terminal Building at Newark.

Although these areas are open to the public, virtually everyone who enters the terminal does so for a purpose related to air travel. These include travelers, persons meeting or seeing off passengers, members of flight crews, and employees of the terminal, an airline or a business in the terminal.

The Port Authority has promulgated a regulation forbidding both the solicitation of money and the repetitive distribution of literature within such areas. That

regulation, which effectively prohibits ISKCON from performing *sankirtan*,[2] states in pertinent part:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.

ISKCON moved for summary judgment on the ground that the airport terminals are traditional public fora for expressive activity and that the Port Authority's regulation thus violates the First Amendment. The district court granted ISKCON's motion, whereupon the Port Authority, in Mr. Lee's name, appealed.

DISCUSSION

The Port Authority does not dispute that ISKCON's in-person solicitation of contributions and distribution of

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[2] While the Port Authority concedes that *sankirtan* may be performed on the sidewalks outside its airports, *ISKCON* does not seek access to those areas. The district court thus concluded that the relevant forum for purposes of determining ISKCON's rights is the place to which ISKCON seeks access – namely, the interior portions of the airport terminals. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 801 (1985).

religious literature are protected speech within the meaning of the First Amendment. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Unlike *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990), which held that begging is not "the kind of 'expressive conduct' protected . . . by the First Amendment," *id.* at 153, the issue here is whether the terminals at Kennedy, La Guardia and Newark are traditional fora for ISKCON's concededly protected activities. Because the terminals are open to the public, heavily traveled and contain a wide array of commercial establishments, the district court concluded that they are akin to public sidewalks and, based on that conclusion and our decision in *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968),[3] struck down the Port Authority's regulation.

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[3] *Wolin* held that the Port Authority's bus terminal in New York City was an appropriate place for distributing leaflets, carrying placards and conducting antiwar discussions with passing pedestrians. We noted that the bus terminal was a place "where the relevant audience [for an antiwar protest] may be found." *Id.* at 90. Because Wolin's antiwar protest was aimed at both "the general public and . . . a special audience – servicemen traveling to and from their bases, particularly buses arriving from Fort Dix" – we struck down the Port Authority's "plenary prohibition of speech" as violative of the First Amendment. *Id.* at 90-91.

The theory of *Wolin* would appear to protect the in-person solicitation of funds inside the bus terminal. Whether that result is still good law need not be decided. *Wolin's* rationale regarding the right to reach particular audiences seems undermined by the Supreme Court's analysis concerning traditional

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Public forum analysis is derived from the axiom that "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799 (1985). In determining whether a particular restriction on protected speech is permissible, the Supreme Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Restrictions on identical kinds of speech may be struck down or upheld "depending on the character of the property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

In recent years, the Supreme Court has classified government-owned property into three categories – "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 473 U.S. at 802. Traditional public fora are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Public streets, sidewalks and

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(Continued from previous page)

public fora, designated fora and nonpublic fora described two paragraphs *infra* in the text of this opinion and by, for reasons stated later in the text, *Kokinda*. However, the Port Authority bus terminal, or portions thereof, contains various commercial establishments that serve non-traveling pedestrians off adjoining streets, *id.* at 85, and is arguably like a public street. In contrast, commercial establishments in the air terminals at issue in the instant matter are not realistically used by persons not connected with air travel.

public parks are paradigmatic examples of such fora, although streets through military basis, *see Greer v. Spock*, 424 U.S. 828 (1976), are a noteworthy exception.

Designated public fora are areas not traditionally open to assembly and debate that the pertinent governmental authorities have intentionally opened for public discourse. *See Cornelius*, 473 U.S. at 802. Nonpublic fora lack the characteristics of traditional public fora and have not been acknowledged by the pertinent governmental authority as consistent with expressive activity. Speakers may be excluded from traditional or designated public fora "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id* at 800. In traditional and designated public fora, therefore, the government may impose only reasonable time, place and manner restrictions unless there is a compelling state interest. By contrast, restrictions on speech are permissible in nonpublic fora so long as they are reasonable and viewpoint-neutral. *See Perry Education Ass'n*, 460 U.S. at 49 & n.9. The Court's three-tiered framework, with its focus on the purposes and attributes of the forum rather than the speaker's desired audience, *see supra* note 3, has become the governing paradigm where, as here, a court must ascertain whether to apply strict scrutiny or some less demanding standard.

ISKCON does not argue that the Port Authority has designated its airport terminals as public fora for expressive activity. This case thus differs from *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), in which the Eighth Circuit held that the City's terminals were traditional public fora but also

emphasized that "[t]he City's regulations . . . implicitly acknowledged that the first amendment activities that take place in more traditional public forums are not incompatible with the purposes of an airport's public concourses." In the instant matter, the Port Authority has not conceded, by regulation or otherwise, that expressive activities are consistent with its operation of Kennedy, La Guardia and Newark. The sole issue on appeal, therefore, is whether the terminal areas are traditional public fora for protected speech.

Neither the Supreme Court nor this circuit has ever addressed the issue of where airline terminals fit in public forum analysis. The "well-established" authority in other circuits, *see Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), is that airport terminals are traditional public fora for speech activities. *See, e.g., Jamison, supra; Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). Prior to the decision in *Kokinda*, this panel was prepared to follow the authority established in other circuits. To hold otherwise would have created a conflict among the circuits over an issue that the Supreme Court has declined to address despite numerous opportunities. Where there is the considerable weight of unanimous authority, we believe that creation of such a circuit conflict must be based on an abiding conviction that the view of several other courts is unreasonable, lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of such conflicts. We believe, however, that *Kokinda*, has altered public forum analysis and that we would not be

faithful to Supreme Court precedent if we were to follow the other circuits.

Until *Kokinda*, and with the exception of *Greer*, the Court's decisions treated streets and sidewalks as traditional public fora without engaging in any detailed analysis of their particular purposes. In *Frisby v. Schultz*, *supra*, for example, the Court held that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. The *Frisby* Court explained that "[n]o particularized inquiry into the precise nature of a specific street is necessary" because "*all* public streets are held in the public trust and are properly considered traditional public fora." 487 U.S. at 481 (emphasis added). Given this approach, the district court's reliance on the visual and other similarities between the terminals' passageways and a "bustling metropolitan boulevard" was understandable.

Kokinda involved a free-standing post office with its own sidewalk and parking lot. The sidewalk was neither connected to any pedestrian thoroughfare nor used for any purpose other than negotiating the space between the post office and parking lot. 110 S.Ct. at 3118. At issue was a Postal Service regulation prohibiting the in-person solicitation of money on postal premises. *Id.* Four members of the Court concluded that the sidewalk was a nonpublic forum and thus applied the reasonableness test of *Cornelius*. Writing for the four, Justice O'Connor stated that the sidewalk was not a public passageway designed "to facilitate the daily commerce and life of the neighborhood or city" but was intended "solely to assist postal patrons" to get access to postal services. *Id.* at 3120. She

further agreed with the Postal Service that the in-person solicitation of funds is "inherently disruptive of the postal service's business" and "impedes the normal flow of traffic." *Id.* at 3123. In particular, she noted that such solicitation "requires action by those who would respond" and is to be distinguished from the distribution of literature that may be taken without pause to be read later. *Id.*

Justice Kennedy, who wrote separately, did not reach the question of whether the sidewalk was a traditional public or nonpublic forum. However, he voted to uphold the regulation as an appropriate time, place and manner restriction on the ground that the government has "a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions." 110 S. Ct. at 3126. His agreement with the plurality was thus limited to the view that the in-person solicitation of funds is disruptive of postal transactions. He noted, however, his belief that other, less disruptive forms of expressive activity, such as leafletting, should be permitted on the sidewalk. *Id.*

Notwithstanding the different rationales employed by the plurality and Justice Kennedy, *Kokinda* dictates reversal of the judgment in the instant action insofar as it invalidates the Port Authority's regulation prohibiting in-person solicitation of funds in the terminals of the three airports. A majority held in *Kokinda* that in-person solicitation of money on the post office sidewalk could be prohibited without violating the First Amendment. Like the sidewalk in *Kokinda*, the Port Authority's terminals are remote from pedestrian thoroughfares and are

intended solely to facilitate a particular type of transaction – air travel – unrelated to protected expression. Persons using the passageways in terminals are not there primarily to meet a friend for lunch, window-shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. They are there solely as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.

The Port Authority's anti-solicitation restriction serves precisely the same purpose as did the restriction upheld in *Kokinda*. Kennedy, La Guardia and Newark are funded by user fees and operated so as to make a regulated profit. Just as the Postal Service in *Kokinda* had a significant interest in protecting users of the branch office from the in-person solicitation of funds, the Port Authority has an interest in protecting its airport patrons from the identical disruption of in-person solicitation. It is true that the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street. It is also true, however, that the facilities in question exist solely to accommodate the needs of air travelers, just as the post office and sidewalk in *Kokinda* existed solely to facilitate the use of postal services.

Given the possibility of further review, we take care to detail our understanding of *Kokinda*. We read the plurality opinion of Justice O'Connor to distinguish between passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor – subway or air travel for example – and passageways or facilities that enable the public to carry out the multitude

of purposes persons pursue in their daily life – the typical Main Street. The former are non-public fora, and government may prohibit the in-person solicitation of funds at least where those using the passageway or facility might be disrupted by such solicitation. Passageways or facilities used solely for a particular purpose are of course among society's choke-points and thus particularly useful to those seeking to solicit funds. However, where the particular purpose is such that the public uses them as a matter of necessity, or at least great convenience, we read the plurality opinion to allow the prohibition of in-person solicitation of funds to prevent disruption of that public. Justice Kennedy reaches the same result because he believes that a prohibition on the in-person solicitation of funds is a legitimate time, place and manner restriction.

The Port Authority's concern over disruption of the air-traveling public is justified on the present record. That record establishes that pedestrian congestion is one of the greatest problems facing the three terminals. Much of the facilities in question was built before wide-body aircraft, and a pressing need for expansion exists. Air travelers, who are often weighted down by cumbersome baggage and may be hurrying to catch a plane or to arrange ground transportation, will find in-person solicitation even more disruptive than did the postal patrons in *Kokinda*. We are thus unable to distinguish that case.

With regard to the Port Authority's ban on the distribution of literature, we read *Kokinda* as looking in a different direction. The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of

leaflets. *See* 110 S. Ct. at 3126-39. They would therefore allow the latter in the air terminals in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." 110 S. Ct. at 3125. Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of funds and the lesser inconvenience of the distribution of literature in upholding the Postal Service regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation and leafletting in upholding the regulation. *See* 110 S. Ct. at 3123-24. There was thus at least a majority, and perhaps more, that would allow the latter. We therefore hold that the Port Authority must provide reasonable access to the terminals for the distribution of literature.

Affirmed in part, reversed in part.

OAKES, *Chief Judge*, dissenting:

At issue in this case is whether the terminal areas controlled by the Port Authority at Kennedy, LaGuardia and Newark airports are traditional public fora, such that the Port Authority's regulation against leafletting and solicitation must be examined under the strict scrutiny standard articulated in *Perry Ed. Ass'n v. Local Educators'*

Ass'n, 460 U.S. 37 (1983), and its progeny. Although this issue has remained open until today in this Circuit, two of our sister Circuits have recognized that airport terminals are traditional public fora. *See Jamison v. City of St. Louis*, 828 F.2d 1280, 1282-84 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). In addition, at least three other circuits have recognized airport terminals as generic "public fora," without distinguishing whether they are of the traditional or designated category. *See United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 763-68 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 626-27 (5th Cir. Unit A. Dec. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *see also Gannett Satellite Information Network v. Berger*, 716 F. Supp. 140, 149 (D.N.J. 1989) ("Newark Airport is a public forum."), *aff'd in part & rev'd in part*, 894 F.2d 61 (3d Cir. 1990). *But see International Caucus of Labor Comms. v. Metropolitan Dade County*, 724 F. Supp. 917, 923 (S.D. Fla. 1989) (Miami International Airport terminal not a traditional public forum). Moreover, we have previously noted in dicta that Krishna devotees practice *sankirtan* in "various public forums – airports, bus stations, state fairs," *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 434 (2d Cir. 1981), and have held that the Port Authority's bus terminal in New York City is a "public forum." *See Wolin v. Port of New York Auth.*, 392 F.2d 83, 88-91 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).[1]

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[1] In *Wolin*, we did not specify whether the bus terminal was a traditional public forum or a designated public forum, as

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Against this backdrop of authority, the majority acknowledges that before the Supreme Court's recent plurality opinion in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), it was prepared to hold that the Port Authority's airport terminals were traditional public fora. However, the majority believes that *Kokinda* has "altered" the Supreme Court's public forum analysis, which it claims now must focus on the distinction between "passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor and [those] that enable the public to carry out the multitude of purposes persons pursue in their daily life." *Supra*. While the latter may be traditional public fora, the majority finds that *Kokinda* stands for the proposition that the former are categorically not public fora. Because I disagree with this assessment, and instead believe that *Kokinda* is neither controlling nor a substantial deviation from the Court's public forum analysis, I respectfully dissent.

Generally, traditional public fora include locations such as streets and public parts, "clearly held in trust, either by tradition or recent convention, for the use of citizens at large," where discussions of public questions

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public forum analysis at that point in time had not yet given rise to the now-familiar triparite distinction between traditional public fora, designated public fora, and non-public fora. Nevertheless, *Wolin's* analogy of the bus terminal to a public street, both with large crowds and stores and concessionaires, supports the proposition that under modern public forum analysis, the Port Authority bus terminal is a traditional public forum. *See id.* at 89.

might ordinarily take place. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984); *see also Perry*, 460 U.S. at 45. But the physical characteristics of a forum do not necessarily determine traditional public forum status. *See Kokinda*, 110 S. Ct. at 3120 ("The mere physical characteristics of the property cannot dictate forum analysis."). Even a public street, for example, may not be a traditional public forum along that portion that runs within the confines of a military base. *See Greer v. Spock*, 424 U.S. 828 (1976) (military reservation, including public street running through it, not traditional public forum). Nor does unlimited public access to a forum necessitate a finding that it is a traditional public forum. *See id.* at 836.

Similarly, the *purposes* for which a forum is designed and to which it is put are not alone determinative of its status. Certainly, the purposes of a forum are highly relevant to the traditional public forum inquiry. In *Greer*, for example, the exigent national security purposes of a military post weighed heavily in favor of the Supreme Court's finding that the Fort Dix Military Reservation is not a traditional public forum. *See* 424 U.S. at 837-38. However, this observation does not compel what I believe is the majority's simplistic conclusion that a forum's purpose can alone dictate its status. Virtually all Government-owned property has an ostensible "purpose" other than the promotion of free speech, assembly, and debate. It can scarcely be argued that the Government builds streets, which are ordinarily traditional public fora, for the primary purpose of fostering First Amendment activities. At least, the Supreme Court does not think it can be. *See Schneider v. State*, 308 U.S. 147, 160 (1939) ("Municipal

authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, *the primary purpose to which the streets are dedicated.*") (emphasis added); *see also Wolin*, 392 F.2d at 89 (acknowledging that Port Authority bus terminal is "designed for precisely the purpose of transit," but nevertheless finding it to be a public forum).

Further undermining the argument that purpose alone is determinative of a forum's status are the Supreme Court's numerous decisions holding that some governmental fora that serve no purpose other than communication of ideas are nevertheless not traditional public fora. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 804 (1985) (federal charity fundraising drive); *Perry*, 460 U.S. at 46 (school district's internal mail system); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (residential mailboxes); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion) (advertising space inside city buses).

Nor do I think that the Supreme Court's recent decision in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), announces a new rule that changes a forum's purpose from being an important factor in public forum analysis to being the sole determinant of a forum's status. At the start, it must be emphasized that *Kokinda* is of questionable precedential value, in that only four Justices agreed that the post office sidewalk at issue was not a traditional public forum. The fifth Justice who cast his vote in favor of the plurality's result agreed that the regulation at issue was a reasonable time, place, and manner restriction, and conceded that "there remains a powerful argument that,

because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum." *See id.* 3125 (Kennedy, J., concurring).

Moreover, even reading *Kokinda* as controlling, there is no basis to conclude from the plurality's opinion that a forum's purpose will, *ipso facto*, illuminate its status. In concluding that the postal sidewalk was not a traditional public forum, Justice O'Connor assessed not only the postal sidewalk's purpose, but also its location, *see id.* 3121, the degree of public access afforded by the sidewalk, *see id.* at 3120, and whether such sidewalks had " 'traditionally served as a place for free public assembly and communication of thoughts by private citizens.' " *Id.* at 3121 (quoting *Greer*, 424 U.S. at 838). In fact, it is the latter inquiry that Justice O'Connor concluded "has illuminated our traditional public forum analysis, and that we apply today." *Id.* This pivotal language demonstrates that the majority is simply wrong in concluding that *Kokinda* stands for the immutable proposition that facilities that exist solely for the "public's carrying on of a particular endeavor . . . are nonpublic fora."

In short, I believe that *Kokinda* reaffirms the basic proposition that traditional public forum status does not turn on any single factor or characteristic. Rather, a more complex balancing determination is necessary, in which it must be determined whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." *Wolin v. Port of New York Auth.*, 392

F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *see also Fernandes*, 663 F.2d at 626 (adopting *Wolin*'s factors for determining public forum status). In other words, we balance the governmental purposes of the forum on the one hand against the tradition of public access to that forum, and the interests of those who wish to use the forum for another purpose, on the other hand. *See Cornelius*, 473 U.S. at 800.[2]

Employing this balancing test, I would agree with the district court that the airport terminals at issue are traditional public fora. For the reasons set forth below, I see no meaningful distinction, in terms of the balance between

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[2] The public forum analytic framework has come under attack from many commentators, and even from four Supreme Court Justices, in part because it lends itself to mechanistic labeling of fora as public or non-public on the basis of their physical characteristics alone. *See Kokinda*, 110 S. Ct. 3127 & n.1 (Brennan, J., dissenting). Even if I agreed with the critics and wished to disregard public forum analysis, what the Supreme Court has adopted is not in my power to cast aside. Nevertheless, I see no necessary inconsistency between public forum analysis and a particularized balancing of First Amendment interests against governmental interests. *See Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring). To put it differently, I view public forum analysis, properly applied, not as a device for inflexible categorization of governmental fora as public or non-public per se. Rather, public forum analysis is a useful shorthand method of evaluating the competing interests of individual speakers in exploiting important channels of communication, and of the Government in regulating the use of its own property. *See* L. Tribe, *American Constitutional Law* § 12-24, at 987 (2d ed. 1988); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1234-35 (1984).

the public's tradition and interest in access and the governmental interest in controlling its property, between airport terminals and ordinary public streets or sidewalks. Both airport terminals as well as public streets and sidewalks are generally accessible to the public, available and appropriate at all times for discussion of public questions. *See Jamison*, 828 F.2d at 1283 ("[A]n airport terminal is much like a busy city street. Both are lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please."); *United States Southwest Africa/ Namibia*, 708 F.2d at 764 ("[I]t seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases."); *Fernandes*, 663 F.2d at 627 (noting "lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses"). In fact, it is conceded that the terminal areas at Kennedy, LaGuardia and Newark contain restaurants, post offices, banks, drug stores, and many other commercial establishments that one would normally expect to encounter on the main thoroughfare of any town in America. The Government's interest in controlling movement and traffic in both fora, while substantial, is no greater in the context of an airport terminal complex than in the context of the public roadway system. Accordingly, I see no greater incompatibility between governmental interests and free-speech interests on an ordinary public street than in the general circulation areas of New York's major airport terminals.

Nonetheless, the Port Authority contends that airport terminals differ from traditional public fora such as

streets, sidewalks, or parks in five different ways: their unique design and usage, their congestion problems, their security problems, their specialized user-fee financing, and the presence of captive audiences. I consider each of these in turn and find none of them individually or collectively persuasive.

Airport terminals and streets or sidewalks alike are designed and used for the efficient movement of travelers. I see no distinction between the amount of planning going into the design of airport passenger terminals compared to our modern urban roadway systems. Both are used for the same purposes – transportation – and I do not see how we can attach any constitutional significance to the fact that one involves travel by airplane and the other by automobile.

The Port Authority puts particular weight on the fact that airport terminals are designed to be geographically isolated from other parts of the community.[3] Indeed, the *Kokinda* plurality emphasized the separation of a post office sidewalk by a parking lot from other municipal sidewalks as an important factor in determining that the post office sidewalk at issue was not a traditional public forum. *See Kokinda*, 110 S. Ct. at 3121 ("[T]he *location* and

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[3] Public highways, the Port Authority points out, isolate the airports from the surrounding communities. These highways, however, are most likely public fora. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora."). It would be anomalous to conclude that the airport's separation from the rest of the community by highways, which are themselves concededly public fora, could weigh in favor of finding the airport terminals to be non-public fora.

purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.") (emphasis added). However, as stated above, *Kokinda* is of questionable precedential value. Moreover, I am considerably less than certain that if the post office building in *Kokinda* had also included the vast array of shops, restaurants, and service centers characteristic of Kennedy, LaGuardia, and Newark Airports that even four Justices would have found that the sidewalk outside was not a traditional public forum. "The Postal Service [had] not . . . open[ed] postal sidewalks to any First Amendment activity." *Id.* at 3121. The Port Authority, by contrast, has invited and welcomed extensive expressive activity within its airport terminals.

I thus think the physical isolation of a forum is relevant only in light of the reasons for its isolation. Only when the Government isolates a particular forum for the purpose of regulating public access does location emerge as a relevant factor in favor of denying public forum status. So, for example, the isolation or separation of a military base from the surrounding community in order to discourage prying eyes would render location highly relevant to the public forum inquiry. Where physical isolation of a forum is the product of happenstance or for functional purposes unrelated to regulation of public access, location becomes far less relevant. It is obvious why airport terminals are isolated and separated from the buildings and skyscrapers of downtown Manhattan and to a certain extent from quiet residential areas. The isolation – if it can be called that – of airports from other parts of the community is in deference to the physics and audiophonics of aviation and not to any notion that the

movement of people and ideas should be restricted. This physical separation does not imply that the airport is any less socially integrated into the everyday flow of people and ideas around the New York metropolitan region. To the contrary, few are the places where one can meet so many persons from diverse parts of the New York metropolitan area as inside its airport terminals.

As for problems of congestion, public streets and sidewalks no less than airport terminals are subject to tremendous traffic problems all over the New York metropolitan area. New Yorkers and others who have had the misfortune of trying to fly out of one of the New York airports during rush hour have discovered the hard way that the greatest risk of missing their flight might well come from the delay of traffic on public streets leading to the airport rather than from the crowds of people circulating within the airport terminals. Moreover, congestion might well weigh in favor of finding the airport to be a traditional public forum. The airport terminals are "an appropriate place for expressing one's view precisely because the primary activity for which [they are] designed is attended with noisy crowds . . . some unrest and less than perfect order." *Wolin*, 392 F.2d at 90 (footnote omitted). I am confident that if the Port Authority can withstand the inefficiencies of movement occasioned by travelers' stopping to visit the numerous vendors and boutiques lining the terminal's corridors (and from which the Port Authority, of course, derives revenue), it can also tolerate at least some inconveniences attendant upon the exercise of plaintiffs' fundamental First Amendment freedoms.

Similarly, security problems are of equal concern on public streets as in airport terminals, even if security problems on the streets are more innocuously labeled as "crime" rather than "terrorism." No one could seriously contend that streets located in dangerous city neighborhoods are not traditional public fora by virtue of the Government's greater need to promote public safety in these areas. The Port Authority no doubt has a powerful interest in maintaining security at its airports. But these concerns are redressable through reasonable time, place, and manner restrictions regulating access to secured areas.

The specialized financing of airports through user-fees, rather than general tax revenue, has no relevance to whether the terminals are traditional public fora. Many streets are also financed by user-fees, e.g., by tolls or by subdivision exactions. By contrast, the top secret areas of military bases, which no one would argue are traditional public fora, are financed by general tax revenues.

Finally, the Port Authority's fear that travelers are a "captive audience" at the mercy of the Krishnas is not well-founded. The Krishnas seek access to persons only in general circulation areas and not check-in areas or baggage claim areas. On these facts, the Constitution requires those who are offended by the Krishnas to "avoid further bombardment of their sensibilities . . . by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

In light of my conclusion that the airport terminals are traditional public fora, it follows that the Port Authority may not impose a complete prohibition on First

Amendment activities absent a compelling governmental interest. I would find no such interest here. Accordingly, the Port Authority's virtual blanket prohibition on First Amendment activities inside the terminal areas it controls cannot be upheld. This much even the majority concedes insofar as leafletting is concerned.

It is of course true that the Port Authority may promulgate reasonable content-neutral time, place, and manner restrictions narrowly tailored to serve a significant governmental interest and permitting alternative channels for communication. *See Perry*, 460 U.S. at 45. I have no doubt that the Port Authority's interest in expediting the movement and safety of travelers is significant. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981); *Fernandes*, 663 F.2d at 626; *Wolin*, 392 F.2d at 93. Therefore, I may well be persuaded that reasonable time, place, and manner regulations that, for example, require permits or badges for solicitors, or that limit the number of solicitors permitted, or that restrict the locations within the terminal buildings where solicitors may conduct their activities would pass constitutional scrutiny. *See, e.g., Heffron* (upholding limitation on Krishna solicitation at state fair to stationary booths); *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978) (upholding restrictions on locations of First Amendment activities within airport); *Wolin*, 392 F.2d at 94 ("[T]he Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised."). However, a complete prohibition of First

Amendment activity – such as the Port Authority's regulation – is, in my mind, not a narrowly drawn regulation that allows for alternative channels of communication, and therefore not constitutionally permissible.

Finally, the distinction between leafletting and fund solicitation that the majority draws I find to be without a difference. Both involve the same congestion, the same irritation, if you will. And may the content of the leaflets permitted be proscribed? If not, will solicitation of funds by leaflet be permitted? If not, what may the leaflet say?

I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Plaintiffs,

-against-

WALTER LEE, et al.,

Defendants.

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75 Civ. 5388 (MJL)

OPINION AND ORDER

(Filed SEP 18 1989)

APPEARANCES:

FISHER & MOEST
Attorneys for the Plaintiffs
2049 Century Park East, Suite 3160
Los Angeles, California 90067

BY: DAVID GROSZ
ROBERT C. MOEST
BARRY A. FISHER

David M. Liberman
Attorney for the Plaintiffs
2049 Century Park East, Suite 3160
Los Angeles, California 90067

LEVY, GUTMAN, GOLDBERG & KAPLAN
Attorneys for the Plaintiffs
275 Seventh Avenue, Suite 1776
New York, New York 10001

BY: EUGENE N. HARLEY

PATRICK J. FALVEY
Attorney for Defendant
One World Trade Center – 66E
New York, New York 10048

BY: ARTHUR P. BERG

MARY JOHNSON LOWE, D.J.

Plaintiff International Society for Krishna Consciousness ("ISKCON") commenced this lawsuit in 1975, challenging the policy of the Port Authority of New York and New Jersey which prohibits the continuous and repetitive distribution of literature to, and solicitation of contributions from, passers-by in the public areas of the passenger terminals at John F. Kennedy, LaGuardia, and Newark International Airports ("the airports"). Plaintiffs claim that the Port Authority's prohibition of these activities within the public areas of the airports violates their rights under the First and Fourteenth Amendments of the Untied States Constitution. Presently before this Court is plaintiffs' motion for summary judgment declaring the Port Authority's regulation unconstitutional. For the reasons set forth below, we adopt the Magistrate's recommendation and grant plaintiffs' motion pursuant to Fed.R.Civ.P. 56.

BACKGROUND

Pursuant to a 1921 Congressionally consented-to compact between the States of New York and New Jersey, the Port Authority is charged with operating the airports at issue in this action. Numerous airlines lease much of that airport space for their own business purposes, and these leased areas are primarily within the control of the airlines. However, the unleased areas, namely, the Arrivals Building of the International Arrivals Building at Kennedy, the Central Terminal Building at LaGuardia,

and the North Terminal at Newark, remain within the control of the Port Authority. Affidavit of Morris Sloane at ¶ 4.

Plaintiff ISKCON is a New York not-for-profit religious corporation which promotes the theological and missionary views of the Krishna Consciousness. Plaintiff Brian Rumbaugh is a member and trustee of ISKCON. As related by counsel for plaintiffs, members of the Krishna Consciousness, in accordance with their religious mandate, are required to perform a ritual known as *sankirtan,* which consists of "going into public places, disseminating religious literature, and soliciting funds to support the religion." Plaintiff's Brief in Support of Motion for Summary Judgment at 6. The performance of *sankirtan* is apparently integral to the practice of Krishna Consciousness, indeed it is "the very lifeblood and principal means of support of this religious movement." *Id.* It is the performance of precisely these activities, however, which the Port Authority, through its regulations, prohibits within the public areas of the airports.

ISKCON commenced this action in 1975 against the Port Authority and its then Police Superintendent, Walter Lee. Because plaintiffs were, in the initial stages of this litigation, seeking access to airline-controlled property as well, Judge Carter – before whom this action was then pending[1] – held the airlines to be indispensable parties and, on that basis, denied plaintiffs' motion for preliminary injunctive relief. *International Society for Krishna Consciousness v. New York Port Auth.,* 425 F.Supp. 681

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[1] The present action was transferred to this Court in September of 1978.

(S.D.N.Y. 1977). Shortly thereafter, plaintiffs amended their Complaint to include, as defendants, several of the airlines leasing space from the Port Authority.

Arguing that their prohibition of plaintiffs' activities did not constitute state action, the airlines moved, in 1979, for dismissal of the Complaint as against them. This Court denied their motion, but certified the state action question to the Second Circuit. After accepting certification, the Court of Appeals subsequently remanded the case for further discovery and development of the evidentiary record. *ISKCON v. Air Canada*, 727 F.2d 253 (2d Cir. 1984). In 1984, we referred the action to Magistrate Michael H. Dolinger for completion of all pretrial matters.

Once discovery was completed, the airlines again moved for dismissal. In 1987, Magistrate Dolinger issued a Report and Recommendation in which he urged that, because the state action requirement had been satisfied, the motions be denied. Subsequent to this Report's issuance, all of the airlines entered into settlement agreements with plaintiffs. Consequently, the Superintendent of the Port Authority Police remains the only defendant to this action.[2]

Arguing that the Port Authority's regulations unconstitutionally prohibit protected First Amendment activity within a public forum, plaintiffs moved, in 1987, for

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[2] In 1977, Judge Carter dismissed the Port Authority as a defendant pursuant to *Monroe v. Pape*, 365 U.S. 167 (1961). *International Society*, 425 F.Supp. at 684-85.

summary judgment or, in the alternative, for a preliminary injunction.[3] Significantly, or so defendant argues, the Port Authority formally adopted regulations, in February of 1988, which prohibit, within the terminal buildings, the type of activity encompassed by *sankirtan*. However, these new regulations do not appear to interfere with the performance of that ritual in the exterior portions of the airports outside the terminal buildings. *See* Affidavit of Morris Sloane, Exhibit B.[4]

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[3] This alternative request for relief was later withdrawn in view of an agreement between the parties which permits the plaintiffs access to the terminal areas *pendente lite*.

[4] The new regulations provide in pertinent part:

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions: . . .

1. The following conduct is prohibited within the inetrior [sic] areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) . . .

(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

. . .

2. The following conduct is prohibited at an air terminal:

(a) . . .

(Continued on following page)

In his Report and Recommendation ("R & R"), dated October 25, 1988, Magistrate Dolinger found that the terminal areas of the airports are, indeed, public fora, and accordingly held that the Port Authority's regulations unconstitutionally restrict the plaintiffs' First Amendment rights. Presently before this Court is the Magistrate's recommendation that plaintiff's motion for summary judgment be granted.

DISCUSSION

THE RELEVANT FORUM

The preliminary issue raised by the Magistrate's R & R, and defendant's Objections thereto, is what effect the Port Authority's newly adopted regulations have on the scope of this Court's inquiry. Defendant urges that all of the real property used in terminal operations – including the exterior sidewalks outside the terminal buildings where *sankirtan* is permitted – should be viewed as the relevant forum and that, accordingly, the regulations at issue be treated as time, place and manner restrictions.

(Continued from previous page)

(b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

Adoption of this approach would have a significant impact on the course of this litigation since, as the R & R indicates, plaintiffs have disclaimed any intention of litigating the validity of such place restrictions. R & R at 8; Transcript of March 25, 1988 hearing at 19. In effect, there would be no litigable controversy remaining and this Court would be forced to dismiss the action.

However, we agree with the Magistrate that "in defining the forum we [should focus] on the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). In the instant case, plaintiffs have consistently limited their demands for access to the interior of the terminal buildings only. Plaintiffs have never, during the fourteen year course of their lawsuit, sought similar access to the airports' exterior sidewalks, nor have they placed their availability in issue, presumably because their status as public fora is beyond per adventure. Moreover, defendant's identification of all airport property as the relevant forum, itself, appears to be of very recent origin. Thus to adopt, at this stage of the proceedings, defendant's present position as to the relevant forum would not only be contrary to the authority of *Cornelius*, but also "fundamentally unfair" given plaintiffs' disclaimer and the underlying "assumption . . . shared by all parties, that this lawsuit involved only the building interiors." R & R at 10.

In his Objections to the R & R, defendant argues that to define the relevant forum in accordance with the dictates of *Cornelius*, as the Magistrate did, would be "illogical since such an approach would render any place restriction on First Amendment activity a prohibition"

and would consequently lead to absurd results. Defendant's Memorandum of Law in Support of Objections at 47. By way of example, defendant argues that a hypothetical prohibition on leafletting activity in the eastern portion of a public park would not, under *Cornelius*, be treated as a place restriction on such activity, but as a prohibition. *Id.*

Defendant's Objections on this point are flawed for two reasons. First, defendant fails to offer any alternative legal standard for defining the relevant forum other than the one supplied by *Cornelius*. Instead, and without supporting legal authority, defendant presumes that by adopting airport-wide regulations, he can, overnight, broaden the scope of this Court's examination. In this approach, defendant places the proverbial cart before the horse. It is not the contested regulations which define the relevant forum, but the particular forum, and the access sought therein, which determines the propriety of the regulations.

Second, defendant's argument presumes that, like his hypothetical park, the interior and exterior portions of the terminal buildings are physically and functionally similar units of the airports as a whole. In point of fact, the exterior sidewalks in the present case share few of the characteristics of the terminals' broad interior vistas. Indeed, those sidewalks are physically, functionally, structurally and conceptually distinct from the airports' interior buildings and hardly offer the same opportunity for effective First Amendment communication. Defendant's argument glosses over these important distinctions and posits a focus too broad and artificial for meaningful forum analysis. Accordingly, we adopt the Magistrate's

determination that the interior airport terminals constitute the relevant fora.[5]

THE TERMINALS AS PUBLIC FORA

All parties to the present action concede that the activity in which plaintiffs seek to engage is, for First Amendment purposes, protected activity.[6] The central issue raised by the instant motion, then, is under what standard should the Port Authority's regulations be reviewed – an issue which, in turn, rests upon how the airport terminals are classified as fora. *Cornelius*, 473 U.S. at 797 (the extent to which the government may limit public access to its property depends on whether the property is a public or nonpublic forum). Plaintiffs assert that the terminals' physical and conceptual similarities to city streets and sidewalks, their identity as "covered public thoroughfares," mandate their treatment as traditional public fora. Citing the terminals' unique characteristics and the Supreme Court's arguably narrow definition of the public forum family, defendant urges, on the other hand, that the airports be regarded as non-public fora.

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[5] We also agree with plaintiffs that other courts have impliedly rejected similar propositions. *See, e.g., Int'l Society for Krishna Consciousness v. Rochford*, 585 F.2d 263, 272 (7th Cir. 1978) (City's contention "that any denial of use of airport facilities would not prevent the Krishna Society from presenting its views anywhere else in Chicago or even on the sidewalks outside the airport terminal" rejected).

[6] *See Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943).

In *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1982), and *Cornelius*, the Supreme Court identified three categories of fora – the traditional public forum, the designated public forum, and the non-public forum – and outlined the standards for review applicable to each within the First Amendment context. In both traditional and designated public fora, the government may not impose content-based restrictions on First Amendment activity unless those restrictions are narrowly tailored to further a compelling state interest. However, the government may impose in those fora content-neutral time, place and manner restrictions, provided such restrictions serve significant governmental interests and leave adequate alternative channels of communication open. *Perry*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 800. In a non-public forum, by contrast, the government may restrict expression, so long as the restrictions are reasonable and do not discriminate against certain viewpoints. *Perry*, 460 U.S. at 46.

It is now well settled that streets, parks and sidewalks are traditional public fora. These public places have been deemed "held in trust for the use of the public- . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45. Such places have, accordingly, been deemed "quintessential" public fora. *Id.*; *see also Frisby v. Schultz*, ___ U.S. ___, 108 S.Ct. 2495, 2499 (1988). The designated public forum is, by contrast, one which the "State has [intentionally] opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 802 ("The government does not

create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"); *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). Despite occasional conflation of the characteristics of these two categories, no serious contention is made here that the terminals fall within the designated forum family. Instead, plaintiffs assert that the airports' unique kinship to city streets render them "well within the notion of traditional public fora." Plaintiffs' Brief in Support of Motion for Summary Judgment at 26.

The Supreme Court has not yet ruled on the issue of whether airports constitute public fora. In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), it granted certiorari on the question, but decided, since the regulation at issue amounted to a "sweeping ban" on all expressive activity, to rule on grounds of overbreadth. Consequently, the issue of the airport's status as a public forum was left unaddressed. The Second Circuit has also not decided whether airports are public fora, but has decided that similar transportation facilities warrant public forum treatment. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.) (Port Authority bus terminal public forum), *cert. denied*, 393 U.S. 940 (1968).

Nevertheless, every circuit which has decided the issue has uniformly held that the public terminal areas of large municipal airports are public fora. *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1289 (1988); *Jews for Jesus v. Airport Com'rs of Los Angeles*, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *USSW Africa*, 708 F.2d 760, 764 (D.C.Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 627

(5th Cir. 1981), *cert. denied,* 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago,* (hereinafter "CAMP") 508 F.2d 921, 926 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); *Kuszynski v. City of Oakland,* 479 F.2d 1130, 1131 (9th Cir. 1973); *ISKCON v. Wolke,* 453 F.Supp. 869, 872 (E.D. Wisc. 1978); *ISKCON v. Griffin,* 437 F.Supp. 666, 672-73 (W.D. Pa. 1977); *ISKCON v. Rochford,* 425 F.Supp. 734, 742 (N.D. Ill. 1977), *aff'd in part, rev'd in part,* 585 F.2d 263 (7th Cir. 1978); *ISKCON v. Engelhardt,* 425 F.Supp. 176, 180 (W.D. Mo. 1977). These courts found that the airports at issue were comparable to city streets in both physical and conceptual aspects which made it appropriate to accord them public forum status. Continuously open to the public and lined with shops, restaurants, newsstands and other businesses for use by the general public, these airports were found to be no less than covered public thoroughfares, indistinguishable from ordinary municipal streets save for their interior nature. *See, e.g., Jamison,* 828 F.2d at 1283; *USSW Africa,* 708 F.2d at 764; *CAMP,* 508 F.2d at 925; *See also, Wolin,* 392 F.2d at 89 (Port Authority bus terminal physically resembles city street). The pattern of activity and the number of people who used the fora daily were also relevant considerations. *See, e.g., USSW Africa,* 708 F.2d at 764.

Lined with all type of services "from banks to barbers to Bloomingdales," so too do the terminals here possess the characteristics of a bustling metropolitan boulevard. Plaintiffs' Memorandum of Law at 37.

> Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the

> vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information . . . The New York airports fit well within the notion of traditional public fora.

Id. at 25-26. Guided by the overwhelming precedent in this area, the Magistrate found plaintiffs' analogy to be a sound and persuasive one. So do we.

In so finding, however, the Magistrate's R & R appears to have moved beyond the two public forum categories – traditional and designated – enumerated in *Perry* and *Cornelius,* in order to incorporate the airport terminals within the public forum family. R & R at 13-14. In this approach, we do not concur, for we find that, as the functional equivalent of public streets, the airport terminals fit "well within the notion of traditional public fora." Accordingly, we need not address defendant's Objections to the R & R on this point.

We must, however, contend with defendant's initial argument, raised in his summary judgment papers, regarding the scope of the traditional public forum category. Defendant's understanding of this classification is a narrow one, limited to "streets and parks" alone, both of which defendant characterizes as a "unique species of public property." Defendant's Memorandum of Law at 16. This Court does not read *Perry* or *Cornelius* so narrowly. Had the Supreme Court intended its list of traditional public fora to be exhaustive, rather then [sic] merely paradigmatic, we believe it would have used more restrictive language. Indeed, the predecessors of those opinions appear to have invited extension of the traditional public forum concept by analogy. *See Hudgens*

v. NLRB, 424 U.S. 507, 515 (1976) ("The essence of those opinions is that streets, sidewalks, parks, *and other similar public places* are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1973) ("Here, we have no open spaces, no meeting hall, park, street corner, *or other public thoroughfare*"); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1938) ("Such use of the streets *and public places* has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens"). We think it unlikely that, by its brief enumeration, the *Perry* court intended to undo literally scores of lower court decisions, within and without this Circuit, which, relying on this earlier authority, build on the public forum concept by analogy. *See, e.g., Jamison*, 828 F.2d 1280, 1283 (8th Cir. 1987) ("an airport terminal is much like a busy city street"), *cert. denied*, 108 S.Ct. 1289 (1988); *Fernandes*, 663 F.2d 619, 627 (5th Cir. 1981) ("in view of . . . the commercial, street-like character of the terminal concourses . . . the [Dallas-Fort Worth] terminal buildings must be treated as public forums"), *cert. dismissed*, 458 U.S. 1124 (1982); *CAMP*, 508 F.2d 921, 925 (7th Cir. 1975) (terminal buildings at O'Hare Airport "resemble those public throroughfares [sic] which have long been recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information"), *cert. denied*, 421 U.S. 992 (1975); *Wolin*, 392 F.2d 83, 89 (2d Cir. 1968) ("The [bus] terminal, with its many adjuncts, becomes something of a small city – but built indoors, with its "streets" in effect set atop one

another . . . "), *cert. denied*, 393 U.S 940 (1968). *See also Frisby v. Schultz*, 108 S.Ct. at 2499 (public streets are "the *archetype* of a traditional public forum"). Nor do we find it plausible that the mere presence of a roof would preclude the terminals' designation as public fora when, in every other relevant respect, they are virtually identical to public streets and thoroughfares.

The second, and final, basis for defendant's Objections to the Magistrate's R & R is his view that the airport terminals are completely dissimilar to city streets "because unlike city streets they are devoted to the single purpose of facilitating air travel. This purpose is reflected in the airport terminals' financing, planning, conditions of congestion, creation of "captive audiences," isolation from the surrounding communities and virtually unique security problems." Affidavit of Morris Sloane at ¶ 10. Although we find the R & R adequately addressed these matters, we will briefly elaborate upon those points highlighted by the defendant's Objections.

Citing *Calash*, 788 F.2d 80 (2d Cir. 1986) and *International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155 (3d Cir. 1982), defendant argues that the airports' specialized financing, reflecting their specialized purpose, precludes their denomination as public fora.[7] Defendant's reliance on *Calash* and *New Jersey Sports* for this proposition, however, is misplaced. No serious contention appears to have been made that the municipal stadium and the sports

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[7] Unlike streets and parks which are financed from general tax funds, the airports are financed from user fees and are therefore financially self-supporting.

complex, respectively at issue in those cases, fell within the traditional public forum category. Rather, the issue raised was whether those facilities had somehow been *designated* as public fora – an issue which is plainly not before this Court. The issue of funding in those cases was therefore relevant in determining whether the sites had been intentionally opened as fora for public discourse. *See, e.g., Calash,* 788 F.2d at 83 ("Under this approach, the circumstances under which the forum was created here show that the City did not intend to open Kennedy Stadium to the general public for all uses or permit its use as a profit making venture. The facility was constructed with funds provided by a federal grant and designated as a "service facility""). We also agree with plaintiffs that there are significant functional distinctions between the terminals and those sites at issue *Calash* and *New Jersey Sports,* for "unlike racetracks and stadia, which are "event specific," the airports here are continuously open without restriction on access by the general public." Plaintiffs' Response to Defendant's Objections at 10.

Defendant further argues that the presence of captive audiences distinguishes the airports from the traditional public fora of streets and parks. Defendant's Objections at 27. With this contention, we do not agree. Captive audiences group outside city concert halls, movie theaters, and outdoor concession stands to the same extent as they form at airport ticket counters, baggage conveyer belts, and security checkpoints. As the R & R indicates, bus terminals and railroad stations suffer from identical problems as well. R & R at 19. Such concerns, however, are the appropriate subject of reasonable time, place and

manner restrictions, not blanket prohibitions on expressive activity.[8]

Nor are pedestrian congestion and security concerns unique to the terminal facilities. Indeed, if concerns over the movement of traffic were sufficient justification for the suppression of First Amendment activity, then the clogged and narrow arteries of downtown Manhattan might, as easily, be denied public forum status. Like the presence of captive audiences, the Port Authority's legitimate concerns over congestion[9] and security are more appropriately the subject of time, place and manner restrictions. *See Fernandes,* 663 F.2d at 626 (traffic concerns do not "justify the total exclusion of those wishing to exercise free speech"); *Wolin,* 392 F.2d at 91 (absolute prohibition of leafletting cannot be defended on the ground that it would obstruct traffic).

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[8] Defendant's reliance on *Lehman* might be more persuasive were plaintiffs seeking access to the aircraft, themselves. We agree with plaintiffs, however, that, as it stands, defendant's analogy between, the terminals and *Lehman*'s city bus interior is, at best, "farfetched." Plaintiffs' Response to Defendant's Objections at 11. *See also USSW,* 708 F.2d at 767 ("A person in the airports' concourse or walkways who considers advertisement . . . to be objectionable enjoys the freedom simply to walk away that a passenger on a bus does not").

[9] It should also be noted that plaintiffs do not seek to perform *sankirtan* in any private offices, ticket counters and lines, check-in areas, baggage claim areas, or exclusively-leased waiting areas – in short, those areas where concerns over security, congestion and captive audiences may be particularly acute. Plaintiffs' Statement of Facts at ¶ 73.

Finally, and without much elaboration upon this proposition, defendant urges that the airports' lack of "integration into the surrounding community" precludes their denomination as public fora. Defendant's Objections at 24. If, by this argument, defendant means that geographical proximity to the surrounding community is an essential component of public forum status, he is quite mistaken, for remote, residential streets, removed from a city's nerve center, are no less deserving of such status than Times Square itself.[10] *Frisby*, 108 S.Ct. at 2500. If, on the other hand, defendant means that surrounding community members must pass through the situs on a daily basis, he fails to cite any authority for so sweeping a proposition. His reliance on *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976) is entirely misplaced. The basis for the Supreme Court's different treatment of the military reservations at issue in those cases was its finding, in *Flower*, that by allowing free and unrestricted access to Fort Sam Houston, the military authorities there had "abandoned any claim [of] special interest in who walks, talks, or distribute leaflets on [its] avenue[s]." 407 U.S. at 1843. The terminals at issue here, like the military reservation in *Flower*, are "open" fora; neither the Port Authority nor the airlines deny or monitor access by members of the general public to the interior general circulation ares of the airports. All

[10] At any rate, none of the airports at issue here are located more than twenty highway miles from midtown Manhattan and all are freely accessible by a network of major thoroughfares. *See* Plaintiffs' Exhibits 8-10.

members of the public are free to frequent the terminal facilities, regardless of whether their presence there is occasioned by a travel-related task. Plaintiffs' Statement of Facts at ¶ 77.

In short, none of the characteristics cited by defendant sufficiently distinguish the airport terminals from the "archetype of a traditional public forum." *Frisby*, 108 S.Ct. at 2499. Nor do we find defendant's repeated invocation of the terminals' "singular purpose of facilitating air transportation" any more persuasive. As the District Court noted in *Fernandes*:

> True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum. "Streets" are primarily designed to assist the movement of traffic and people, but they are proper First Amendment forums.

465 F.Supp. 493, 501 n.4 (N.D.Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). After careful consideration of defendant's Objections, we agree with plaintiffs that the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family. Given that finding, no argument is presented here – nor can one be made in earnest – that defendant's blanket prohibition on leafletting and solicitation is narrowly tailored to further a compelling state interest.

There being no genuine issue of material fact raised by the submissions, plaintiffs' motion for summary judgment is granted.

It Is So Ordered.

Dated: New York, New York
September 15, 1989

/s/ Mary Johnson Lowe
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. et al., Plaintiffs, -against- WALTER LEE, Superintendent of the Port Authority Police, individually and in his official capacity, et al., Defendants.	REPORT AND RECOMMENDATION 75 Civ. 5388 (MJL)

TO THE HONORABLE MARY JOHNSON LOWE, U.S.D.J.:

Plaintiffs commenced this venerable lawsuit in 1975 to seek injunctive and declaratory relief from the policy of the Port Authority of New York and New Jersey, which prohibited plaintiffs from distributing literature and soliciting contributions within the public areas of the passenger terminals located at John F. Kennedy International, LaGuardia, and Newark International Airports. The litigation was subsequently expanded to include as defendants several dozen airlines as well as the Port Authority, but the plaintiffs have settled with all defendants except the Port Authority. Accordingly, they are now limiting their attention to those public areas within

the terminals that are directly controlled by the Authority.

Having completed all discovery, plaintiffs seek summary judgment declaring that the defendant's policy denying them any access to those areas is invalid under the first and fourteenth amendments. For the reasons that follow, I recommend that the motion be granted.

I. Procedural History

When plaintiffs began this action, they named only the Port Authority and its then-police superintendent, Walter Lee. The focus of their suit was the refusal by the Authority and the airlines that had leased terminal space from the Authority to permit adherents of the Krishna Consciousness faith, or indeed anyone else, to stand inside any of the public areas of the terminals of the three major New York area airports for the purpose of leafleting and solicitation of contributions. In 1977 the District Court held that the lessee airlines were indispensable parties since the plaintiffs were seeking access to terminal space under their control. *See ISKCON v. New York Port Authority*, 425 F. Supp. 681, 686 (S.D.N.Y. 1977). The complaint was subsequently amended to include numerous airlines as defendants.

In 1979 the airline defendants moved to dismiss the complaint on the ground that their prohibition of plaintiffs' activities did not constitute state action. The court denied this motion, holding that the "symbiotic relationship" existing between the airlines and the Port Authority established sufficient state action to withstand a motion

to dismiss. (Memorandum Opinion and Order, July 23, 1982, at 55.) The court also denied plaintiffs' cross-motion for preliminary injunctive relief based on the representation of the Port Authority that it was not enforcing its prohibitory regulations during the pendency of the lawsuit. (*Id.* at 58.)

The District Court certified its "state action" decision to the Court of Appeals. Although the Court of Appeals initially accepted certification, it later issued a per curiam opinion declining to decide the issue and remanding the case for further development of the evidentiary record. *ISKCON v. Air Canada*, 727 F.2d 253 (2d Cir. 1984). Upon remand, the case was referred to me for all pre-trial purposes and discovery was completed on an expedited schedule.

The remaining airline defendants then renewed their motions to dismiss. On June 1, 1987, I issued a Report and Recommendation concluding that the state-action requirement had been satisfied and recommending that the motions therefore be denied. Subsequently, the airline defendants entered into settlement agreements with plaintiffs, leaving only the Port Authority police superintendent as a defendant.

On November 11, 1987, plaintiffs moved for summary judgment or, in the alternative, for a preliminary injunction restraining enforcement of the Port Authority's prohibitory policy. Plaintiffs subsequently withdrew their request for a preliminary injunction on the understanding that the Port Authority's interim agreement allowing leafleting and soliciting activities inside the terminals would

continue for the duration of the litigation. (*See* Plaintiffs' Reply to Opposition at 23.)

On February 11, 1988, before oral argument was heard on the summary judgment motion, the Port Authority formally adopted regulations prohibiting the distribution of literature and solicitation of donations in the interior terminal areas under its control but permitting such activity outside the terminal buildings. (*See* Affidavit of Morris Sloane, dated April 21, 1988, at ¶¶ 8, 9 & Exh. B p. 4.) These regulations apparently do not establish a new policy but rather amount to a codification of the pre-suit policy. (*See* Affidavit of Brian Rumbaugh, sworn to May 5, 1988, at ¶¶ 5-6). At the request of the Court, however, the parties have filed supplemental papers addressing the effect, if any, of these new regulations on the pending motion.

II. The Facts Established on the Motion

The International Society for Krishna Consciousness ("ISKCON") is a not-for-profit religious organization espousing the missionary views of Krishna Consciousness. Integral to this religion is the practice of *sankirtan*, which consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." (Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at ¶ 3.) Plaintiffs wish to engage in this activity in the general circulation areas of John F. Kennedy International, LaGuardia, and Newark International Airports ("the airports"), which are owned by the states of New York and New Jersey and operated by the Port Authority. However, Port Authority policy

prohibits the continuous and repetitive distribution of literature and solicitation of money in the airport terminals. (Civil Rule 3(g) Statement of Defendant at ¶ 30. Defendant's Rule 3(g) Statement is annexed to the January 19, 1988 affidavit of Morris Sloane.)

The Port Authority is charged with operating the airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35.4 (West 1963). In accordance with its statutory powers, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas while the Port Authority retains certain supervisory powers. (*See* Defendant's Statement at ¶¶ 32-38; Plaintiffs' Statement at ¶¶ 146-49.) The Port Authority retains complete control over all unleased areas, namely, the Central Terminal Building at LaGuardia, the International Arrivals Building at Kennedy, and the North Terminal at Newark. (Defendant's Statement at ¶ 29.) It is these unleased areas that remain at issue in this lawsuit.

The airport terminals under Port Authority control are busy places containing large open lobbies and corridors lined with a variety of shops, restaurants, and other businesses. (See Plaintiffs' Statement at ¶¶ 18, 21-23, 50-55, 66; Defendant's Statement at ¶¶ 3, 4, 11.)[1] For example, the

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[1] There are minor discrepancies between the plaintiffs' and defendant's statements of facts, possibly due to the passage of time between the two submissions. These variations are not material, as the precise number of each type of commercial establishment is less important than the undisputed fact that there are many such establishments bordering the Port Authority-controlled spaces. For purposes of this summary judgment motion, the defendant's version of the facts will be adopted whenever there are discrepancies.

second-floor lobby of the International Arrivals Building at Kennedy is bordered by two restaurants, two snack bars, a bar, a postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, and two currency exchange facilities; it also contains a dental office and a place for the display of art exhibits. (Plaintiffs' Statement at ¶ 18.) The second-floor corridors are lined by eight duty-free shops, four bars, two snack bars, a bank, two currency exchanges, two bookstores, two newsstands, two cookie/candy shops, four travel insurance areas, a cash/traveler's check machine, and a retail Bloomingdale's; they also contain seating facilities and free-standing advertising displays. (Defendant's Statement at ¶¶ 3, 4.)

The Port Authority-controlled areas are open to the public at all times. The Port Authority does not deny or monitor the access of the general public to the three airport complexes or to the general-circulation areas in the buildings. (Plaintiffs' Statement at ¶ 77.) Thus, the facilities are freely available to all persons, whether or not they have travel-related tasks. According to undocumented Port Authority surveys, 80% of the people in the airports are travelers, 15% are "meeters and greeters", and 5% are employees. (Defendant's Statement at ¶ 64.) In 1986, the airports served 78,846,000 passengers; this number is expected to increase to 110 million in the 1990s. (Plaintiffs' Statement at ¶ 10.)

III. Analysis

Plaintiffs' motion requires us to consider two separate if related issues. First, the recent adoption of regulations

by the Port Authority that explicitly authorize leafleting and solicitation on the sidewalks directly adjacent to the terminal buildings raises the question of whether plaintiffs' claim which is explicitly limited to a facial challenge to the absolute prohibition against solicitation and leafleting at the airport terminals – has been mooted. Second, if the claim is still viable, we must address the central question in this lawsuit, which is whether the public areas within the terminal buildings constitute public fora and thus must be made available, on reasonable terms, for first amendment activities absent compelling reasons for barring access.

A. The Relevant Forum

The initial question is whether the Port Authority's formal adoption of a policy permitting expressive activities on the sidewalks outside the terminal buildings moots plaintiffs' claim. This concern arises because plaintiffs have limited their lawsuit to a challenge against the facial validity of a prohibition on all first amendment activity and have explicitly disclaimed any intention to litigate the validity of "time, place, and manner" restrictions in this lawsuit. (*See, e.g.*, Memorandum and Order dated February 27, 1985, at 14-15; Transcript of September 25, 1984 hearing at 17-19; Transcript of March 25, 1988 hearing at 19.) Plaintiffs seek, in essence, simply a declaration that the public areas of the terminals are public fora and that the Port Authority must adopt regulations consistent with that conclusion. (*Id.* at 17-18.)

If the relevant forum in this case were deemed to encompass both the interior of the terminal buildings and

their adjacent sidewalks, then the Port Authority's policy could not be viewed as a total prohibition of first amendment activity but rather as a "time, place, and manner" restriction governing the airport terminal areas as a whole. In that case, plaintiffs' claim would presumably fail since the only litigable issue would be the reasonableness of the restriction, an issue beyond the scope of the complaint as defined by the plaintiffs.

This question was addressed in the parties' supplemental submissions. Based on those papers and the prior record in this case, I conclude that the relevant physical space for purposes of this action is the interior public space of the terminals. Accordingly, there remains a viable case or controversy justifying the entry of a declaratory judgment.

Leafleting and soliciting have always been permitted in the exterior areas (*see* Rumbaugh Aff., sworn to May 5, 1988, at ¶¶ 5, 6; Defendant's Statement (predating formal regulations) at ¶ 30: policy prohibits activities *in* the airport terminals), and the availability of those areas to the plaintiffs has therefore never been in issue in this suit. Plaintiffs did not litigate over the exterior because they did not have to, and accordingly all the parties have focused on the interior terminal area as a discrete and independent forum. This treatment is consistent with the existing case law, which has concentrated almost exclusively on interior areas, presumably because the status of sidewalks and other exterior areas as public fora is not questioned. *See, e.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1289 (1988); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983);

Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

The focus of the plaintiffs on the interior of the terminal buildings has further independent significance for this analysis. In *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 801 (1985), the Court declared that the relevant forum should be defined in terms of the access sought by the speaker. Here, the plaintiffs seek access, not to airport property generally, but specifically to the interior areas of the terminal buildings. This alone should justify the Court in proceeding to adjudicate the question of whether the building interiors constitute a public forum.

Indeed, to do otherwise would be fundamentally unfair to the plaintiffs. In declaring their willingness to forgo any challenge in this lawsuit to the reasonableness of time, place, and manner restrictions, plaintiffs were obviously relying on the assumption, then shared by all parties, that this lawsuit involved only the building interiors. We may reasonably infer that the premise for plaintiffs' stated position was that they sought some form of access to the interiors but were willing to postpone any legal challenge to the specific ground rules for such access. The current regulations do not grant such access and accordingly we cannot treat plaintiffs' narrow definition of their claim as tantamount to a surrender of their right to challenge the very policy that led to the filing of this lawsuit. In sum, the relevant space for purposes of public-forum analysis consists of the public areas within the terminal buildings.

B. The Public Forum

The question now posed is whether the interior terminal areas controlled by the Port Authority constitute a public forum. If so, a total ban on leafleting and soliciting[2] activities is unconstitutional unless it is necessary to serve a compelling government interest; otherwise only reasonable time, place, and manner restrictions are permissible. If these areas are not deemed to be a public forum, the Port Authority may restrict or prohibit particular forms of expression as long as it does not discriminate against specific viewpoints. *See generally Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983); *U.S. Southwest Africa*, 708 F.2d at 763.

Plaintiffs contend that the general circulation areas inside the terminals are public fora. They view the terminals as "covered public thoroughfares" closely analogous to the quintessential public fora of streets and parks:

> Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information. . . . The New York airports fit well within the notion of traditional public fora.

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[2] The first amendment protects the distribution of literature, *Organization for A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and the solicitation of contributions on behalf of a religious cause, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

(Plaintiffs' Brief in Support of Motion for Summary Judgment at 25-26).

Plaintiffs cite numerous cases in support of this conclusion. Indeed, the courts have unanimously agreed that airport terminals are public fora. *See, e.g., Jamison*, 828 F.2d at 1283 ("every court that has decided the issue has held that an airport is a public forum"); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 107 S. Ct. 2568 (1987); *U.S. Southwest Africa*, 708 F.2d at 766 ("an unusual consensus of judicial, legislative, and administrative opinion" classifies the public areas of airports "squarely within the public forum family"); *Fernandes*, 663 F.2d at 626; *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 272 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924-26 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973); *ISKCON v. Wolke*, 453 F. Supp. 869, 872 (E.D. Wis. 1978); *ISKCON v. Engelhardt*, 425 F. Supp. 176, 180 (W.D. Mo. 1977). *See also* 45 Fed. Reg. 35,314 (1980) (Federal Aviation Administration declares that public areas of airports are public thoroughfares where first amendment guarantees apply). These courts found that the character, function, and design of the airports made them so similar to ordinary city streets that they merited identical first amendment treatment. *See, e.g., Jamison*, 828 F.2d at 1283; *U.S. Southwest Africa*, 708 F.2d at 764; *Fernandes*, 663 F.2d at 627; *Chicago Area Military Project*, 508 F.2d at 925.[3]

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[3] Some of these courts invoked additional considerations in support of their conclusion. *See, e.g., Jamison*, 828 F.2d at

(Continued on following page)

The Supreme Court has not yet addressed this question. Although the Court did affirm the Ninth Circuit in *Jews for Jesus*, that ruling was based on another ground – the substantial overbreadth of the airport policy; the Court explicitly declined to decide whether an airport is a public forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2573 (1988). Other Supreme Court cases are not sufficiently analogous to provide clear guidance.

The Second Circuit has also not reached this question with regard to airports, but has concluded that similar facilities are public fora. It has so categorized railroad stations, *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir. 1984), the Port Authority bus terminal, *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), and, by implication, subway stations. *See Wright v. Chief of Transit Police*, 558 F.2d 67, 68-69 & n.1 (2d Cir. 1977).

Faced with this overwhelming adverse case authority, the Port Authority argues that these decisions misapply Supreme Court precedent and ignore the special nature and purpose of airport terminals. *Citing Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985), the Port Authority

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1283 (existence of city regulation protecting expressive activity in airport); *U.S. Southwest Africa*, 708 F.2d at 765 (FAA regulations). These additional factors, however, were not crucial to these courts' decisions.

suggests that the Supreme Court has strictly limited public-forum status to two categories, neither of which is applicable here. According to defendant, the High Court recognizes only "designated" public fora, which include only those places that the government intentionally opens as a forum for public discourse, *see Cornelius*, 473 U.S. at 802, and "traditional" public fora, which are narrowly defined to include only those places that have traditionally been devoted to assembly and debate. In the Port Authority's view, airport terminals cannot be considered public fora because the Authority has not deliberately invited their use for public expression and because they have no tradition of assembly and debate.

The Port Authority's reading of the Supreme Court's forum analysis is unduly restrictive. The *Perry* Court, in describing these two categories, did not suggest that they are the only types of locales that can be deemed public fora. Rather, the Court in *Perry* simply identified two types of sites whose public-forum status is certain and then indicated that for sites not coming within these two groups, the court must conduct a case-by-case inquiry into the nature and function of the site to determine whether or not it can properly be characterized as a public forum. *See* 460 U.S. at 47-48. *See also Cornelius*, 473 U.S. at 804-06[4]; *Wolin*, 392 F.2d at 88-90; *Fernandes*, 663

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[4] Although *Cornelius* did appear to read the *Perry* formulation narrowly, this discussion came in the context of an analysis of an assertedly designated public forum rather than an analogy to a traditional public forum. In any event, *Cornelius*, like *Perry*, did not state or suggest that designated and traditional public fora were the only possible types, and its subsequent factual analysis indicated quite the contrary. *See* 473 U.S. at 804-06.

F.2d at 626-27. Thus, although *Perry* did represent an attempt at clarification of existing public-forum analysis, it did not limit public fora to the two narrow categories that it identified. If anything, *Perry* underscored the importance of an *ad hoc* factual analysis in determining the status of a given site.

Similarly, contrary to the Port Authority's suggestion (Memorandum in Opposition at 32), Supreme Court forum analysis does not require that a site have public communication as its purpose in order to be considered a public forum. While such a purpose is certainly a relevant consideration, it is not a requirement. Indeed, as the Court recently made clear, even narrow residential streets that have never in fact been held open for public communication are unquestionably public fora because, regardless of their particular characteristics, all public streets are deemed to be held in trust for the use of the public. *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988).

The Port Authority faults the plaintiffs, and the cases on which they rely, for classifying airport terminals as public fora "merely because access to the terminals is unrestricted and the terminals would be useful to plaintiffs as a site for leafletting and soliciting of funds." (Memorandum in Opposition at 27.) Citing *United States v. Albertini*, 472 U.S. 675 (1985), *Greer v. Spock*, 424 U.S. 828 (1976), *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the Port Authority argues that "under applicable Supreme Court precedent, it is clear that neither open access nor usefulness as a site of communication render a site a public forum." (*Id.*) This statement is true as far as it goes. However, although a

site need not automatically be defined as a public forum just because it is either open to the public or useful for communication, the cited cases certainly did not eliminate these factors as important considerations.[5]

Accordingly, the Port Authority is off-base in insisting that the cases relied on by plaintiffs have misapplied Supreme Court precedent, because Supreme Court precedent has basically left the question open. No hard-and-fast requirements have been imposed, and nothing the Court has said precludes airport terminals from being classified as public fora.

In deciding whether a particular place is a public forum, courts generally consider its character and function to determine whether it is more akin to a private place with "government property interests essentially mirroring analogous private interests" or a public place "clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Members of City Council*, 466 U.S. at 815 n.32. *See, e.g., Wolin*, 392 F.2d at 88-89; *U.S. Southwest Africa*, 708 F.2d at 763-64. As the plaintiffs note, those areas found not to be public fora by

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[5] Moreover, these cases are readily distinguishable from the instant case. *Albertini* and *Greer* both involved military bases which, although open to the public, were special enclaves not subject to ordinary civilian rules. Their controlled environment and specialized program make them wholly dissimilar to the airport terminals at issue here. *Vincent* and *Greenburgh* involved utility poles and household mailboxes, respectively. Although these items might be useful as instruments of communication, the Court found them inappropriate for use as a public forum. Utility poles and mailboxes, of course, bear no resemblance to the open concourses of airports.

the Supreme Court are, "for the most part, physical or metaphysical 'places' that are constructed and used for very narrow purposes and are not open to the public." (Plaintiffs' Reply to Opposition at 6-7 (citing numerous cases).) In contrast, government-owned property that is fully available to the general public is almost always found to have public-forum status.[6] Thus, although the fact that an area is generally open to the public is not necessarily dispositive, it has proved to be a salient factor. *See United States v. Grace*, 461 U.S. 171, 177 (1983); *Jamison v. City of St. Louis*, 671 F. Supp. 641, 644 (E.D. Mo. 1986) (fact that an area is a public place ordinarily means it is a public forum), *aff'd in part & rev'd in part*, 828 F.2d 1280 (8th Cir. 1987); *ISKCON v. Wolke*, 453 F. Supp. at 872-73.

Conceding that the airport terminals are open to the general public at all times, the Port Authority nonetheless argues that they cannot be viewed as public fora because of their "singular purpose": "In sharp contrast to streets and parks which have the exchange of ideas as a principal purpose, airports have only one purpose, *i.e.*, to effectuate the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft." (Defendant's Memorandum in Opposition at 18.) By emphasizing this point, the Port Authority seeks to invoke those Supreme Court cases (*see supra* note 5) that have denied access to certain government-owned sites because of the government's interest in protecting their limited purpose and function.

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[6] The most significant exception is open military bases. *See supra* note 5.

The Port Authority identifies several characteristics of the airport terminals that purportedly illustrate their "singular purpose" and distinguish them from traditional public fora. None, however, is persuasive.

First, the Authority says, "[s]treets and parks are financed from general tax funds. In contrast, . . . airports are financed from user fees paid by the airlines, concessionaires, air passengers and general aviation [and federal grant money]." (Memorandum in Opposition at 18, 19.) While this may be true, it has no bearing on whether the airport terminals constitute public fora. Since it is clear that the Port Authority is a government entity in control of government-owned property, the exact sources and types of funding are immaterial. At best, this information might be relevant to a state-action analysis, but that is not in issue because the Port Authority is concededly a state actor.

Second, the Port Authority describes the airports' lack of integration into the daily life of the surrounding communities. It is obvious why an airport cannot be physically located in the middle of town; this does not mean that the terminals are not public thoroughfares, nor that they are somehow divorced from daily life. In fact, the airports are part of the daily life of millions of people every year, including non-travelers. (*See* Defendant's Statement at ¶64). Certainly public-forum status cannot be made to depend on whether people walk through the site every day on their way to work.

Next, the Port Authority argues that because people in airports "tend to remain at [various] locations to complete travel-related tasks," they "constitute a captive

audience for anyone expressing his or her views within their visual or aural range." (Memorandum in Opposition at 23.) Although this may pose a logistical problem in the airline-controlled areas, where persons might have to wait on line in a confined place, it is much less likely to pose difficulties in the general-circulation areas controlled by the Port Authority. At any rate, this type of captive-audience problem does not preclude public-forum status: bus terminals and railroad stations, which suffer the same problem, are public fora anyway. Such conditions indicate only that time, place, and manner restrictions may be appropriate.

The Port Authority also makes much of the "unique pedestrian congestion problems" in the airport terminals. (*Id.*) Again, however, such problems can be addressed by reasonable time, place, and manner restrictions. Streets, bus terminals, and railroad stations are sporadically congested in much the same way as airports, but they are nonetheless public fora. As the Second Circuit noted in rejecting a similar argument, "the congestion and controversy that may attend the activity in the Terminal, while pertinent to the enactment of rules and regulations to govern the activity, cannot be invoked to support a flat prohibition." *Wolin*, 392 F.2d at 92. *See also ISKCON v. Wolke*, 453 F. Supp. at 874.

Finally, the Port Authority emphasizes the heightened security concerns faced by airports because of the "potential dangers of terrorist bombing and air piracy." (Memorandum in Opposition at 26.) However, a concern regarding weapons and hijackings, while real, does not justify a denial of first amendment rights in an area completely open to the public, and does not preclude its

denomination as a public forum. Moreover, the Port Authority offers no evidence to support the assumption that this concern is especially pressing in the Port Authority-controlled areas, as distinguished from the departure gates, which are controlled by the airlines. Finally, even if defendant had bothered to document its security concerns on this motion, they would suggest only that reasonable time, place, and manner restrictions are appropriate, not that the public thoroughfares should not be used at all for leafleting or solicitation.

In sum, the Port Authority's insistence on the "singular purpose" of the airport terminals is not well taken. Although the airports were created for the purpose of facilitating air travel, they serve many other functions as well – most notably, that of a meeting place and public thoroughfare where people may come and go as they please. As the court in *Chicago Area Military Project v. City of Chicago* noted in response to a similar argument by the government there, "the fact is that great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity." 508 F.2d at 925. Similarly, in *Fernandes v. Limmer*, 465 F. Supp. 493, 501 n.4 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), the court stated:

> True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum. "Streets" are primarily designed to assist the movement of traffic and

people, but they are proper First Amendment forums.

In seeking to avoid this conclusion, the Port Authority cites the decision of the Third Circuit in *ISKCON v. New Jersey Sports & Exposition Authority*, 691 F.2d 155 (3d Cir. 1982). The court there held that the Meadowlands Sports Complex is not a public forum even though it is a government-controlled site open to the public and useful for communicative activity. The court viewed the Meadowlands Complex as very different from traditional public fora because it was designed by the state to be solely a revenue-earning enterprise. Accordingly, the court concluded that the plaintiffs' soliciting activity in the sports complex would be in direct conflict with the primary function of the complex, which was to earn money for the state via the concession stands and betting activity. *Id.* at 161-62.

Defendant's reliance on *Sports Authority* is misplaced. First, the case is plainly distinguishable. The Meadowlands complex is a purely commercial establishment consisting of discrete sporting arenas surrounded by seating facilities and a few concession stands. It is open only at certain times, to paying guests, for specific events. It is not a transportation facility and it is not filled with a variety of stores, restaurants, newsstands, and other businesses.

Second, the *Sports Authority* decision is of doubtful precedential weight even in the Third Circuit, for half of the active circuit members voted to grant rehearing *en banc*. *See* 691 F.2d at 163. Indeed, three judges specifically faulted the panel opinion as sweeping too broadly and

relying too heavily on traditional formal notions of fora. *See id.*

Third, to the extent that the decision reflects a rigid formulation of the public-forum analysis, it is inconsistent with Second Circuit precedent, which requires a case-by-case analysis, focusing primarily on whether expressive activity is appropriate for the site in question. For example, in *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir. 1984), the court declared that

> [p]ublic property . . . which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property, *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1054 (2d Cir. 1983) (*ECCAG*), and is not "incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 . . . (1972).

See also Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319, 1323-24 (2d Cir. 1974); *Wolin*, 392 F.2d at 89 ("[D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views. . . . "). This approach is completely consistent with Supreme Court precedent, which, as noted, undertakes a factual analysis to determine the appropriateness of the proposed activity for the site in question.

The Port Authority also relies on *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986), which concluded that a municipal stadium was not a public forum because

it was not held open to the general public and was specifically reserved for use by civic and charitable organizations. The court essentially determined that the plaintiff's proposed activity, a profit-making rock concert, was incompatible with the primary purpose of the site. *See id.* at 83-84.

This decision is of no assistance to the Port Authority because of the crucial differences between the stadium and the airport passenger terminals. Indeed, the analysis in that case is entirely consistent with the conclusion that the terminals do constitute public fora since they are fully open to the public and their primary purpose has not been shown to be incompatible with regulated expressive activity of the type at issue here.

The record in this case fails to raise any question about the appropriateness of leafleting and solicitation in the terminals. There is no fundamental incompatibility between plaintiffs' *sankirtan* activity and the ordinary goings-on in an airport terminal. To the contrary, the large, open terminals, which are filled with people walking, talking, shopping, and just passing time, are plainly appropriate places for such expressive activity. "[T]he concourse of a large airport facility . . . has the character, pattern of activity, and nature of purpose that make it an appropriate place for the communication of views." *Jamison,* 828 F.2d at 1283.

Moreover, the interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general

public coming and going as they please." *Id.* Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

On the whole, then, it seems "clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *U.S. Southwest Africa,* 708 F.2d at 764. None of the Port Authority's proffered arguments can defeat the "clear and powerful" analogy, *Fernandes,* 663 F.2d at 627, between traditional public fora and the open areas of these airport terminals.

CONCLUSION

In view of the foregoing, the unavoidable conclusion is that there are no genuine disputes of material fact, Fed. R. Civ. P. 56 (c), and the undisputed factual record demonstrates that the public thoroughfares within the terminals that are controlled directly by the Port Authority must be classified as public fora. It is equally clear on the current record that there are no compelling reasons that would justify a total prohibition against leafleting and solicitation within these areas and that defendant's policy to the contrary contravenes plaintiffs' rights under the first amendment.

For the reasons noted, I recommend that plaintiffs' motion for summary judgment be granted. Specifically,

they are entitled to a declaration that the general circulation areas of the passenger terminals directly controlled by the Port Authority at the JFK International, LaGuardia, and Newark International Airports are public fora, and that a total prohibition against leafleting and solicitation within these buildings is inconsistent with the requirements of the first amendment. This conclusion is of course without prejudice to the right of the Port Authority to impose reasonable time, place, and manner restrictions.

Pursuant to Rule 7 of the Rules of Proceedings Before A U.S. Magistrate, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Mary Johnson Lowe, Room 803, and to the chambers of the undersigned, Room 503. Failure to file timely objections may constitute a waiver of those objections. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988).

DATED: New York, New York
October 25, 1988

RESPECTFULLY SUBMITTED,

/s/ Michael H. Dolinger
Michael H. Dolinger
United States Magistrate

Copies of the foregoing Report and Recommendation have been mailed this date to:

David Grosz, Esq.
Fisher & Moest, Esqs.
2049 Century Park East
Suite 3160
Los Angeles, California
90067

Eugene N. Harlay, Esq.
Levy, Gutman, Goldberg
& Kaplan, Esqs.
275 Seventh Avenue, Suite
1776
New York, New York 10001

David M. Liberman, Esq.
9806 Washington
Boulevard
Culver City, California
90034

Patrick J. Falvey, Esq.
Philip A. Mauer, Esq.
Arthur P. Berg, Esq.
Port Authority of New
York and New Jersey
One World Trade Center,
Room 66-E
New York, New York 10048

William H. Boice, Esq.
Kilpatrick & Cody, Esqs.
3100 Equitable Building,
Suite 3100
100 Peachtree Street
Atlanta, Georgia 30043

John Martin, Esq.
Bigham, Englar, Jones
& Houston, Esqs.
14 Wall Street
New York, New York 10005

Leonard Rubel, Esq.
Zalk, Rubel & Perret, Esqs.
608 Fifth Avenue
New York, New York 10020

Philip Le B. Douglas, Esq.
Winthrop, Stimson, Putnam
& Roberts, Esqs.
40 Wall Street
New York, New York
10005-1370

Allen Rubeo, Esq.
Alan D'Ambrosio, P.C.
501 Fifth Avenue
New York, New York 10020

Laurence A. Short, Esq.
Short, Klein & Karas, P.C.
1101 Thirtieth Street, N.W.
Suite 303
Washington, D.C. 20007

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1990

Docket No. 89-9182

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and ninety-one.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members,

Plaintiff-Appellees,

– v. –

WALTER LEE, Superintendent of Port Authority Police,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees International Society for Krishna Consciousness, Inc., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing en banc having been transmitted to judges of the Court in regular active service and to any other judge that heard the appeal and a poll of said judges having been taken, a majority of the Court has voted not to reconsider the decision in banc. Chief Judge Oakes dissents from the denial of the rehearing in banc in a separate opinion, in which Judges Newman and Cardamone concur.

OAKES, *Chief Judge*, with whom NEWMAN and CARDAMONE, *Circuit Judges* join, dissenting from denial of rehearing en banc:

I dissent from the denial of rehearing en banc for three reasons. First, rehearing is necessary to avoid a clear-cut conflict among the circuits, created by the panel's decision, as to whether airport terminals are traditional public fora. *Compare International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576 (2d Cir. 1991) (finding that terminals are not traditional public fora) *with Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987) (finding that terminals are traditional public fora), *cert denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986) (same), *aff'd on other grounds*, 482 U.S. 569 (1987). *See also United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) (finding that terminals are generic public fora, without distinguishing between

the "traditional" or "designated" categories); *Fernandes v. Limmer,* 663 F.2d 619 (5th Cir. Unit A. Dec. 1981) (same); *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921 (7th Cir.) (same), *cert. denied,* 421 U.S. 992 (1975).

Second, rehearing is necessary to clarify our circuit's understanding of *United States v. Kokinda,* 110 S. Ct. 3115 (1990) (plurality decision), which the panel claims has "altered public fora analysis." *Lee,* 925 F.2d at 580. Given that only a plurality of the justices in *Kokinda* decided that the post office sidewalk there was not a traditional public forum, and did so without exclusive reliance on the sidewalk's purpose, *see Lee,* 925 F.2d at 584 (Oakes, *C.J.,* dissenting), as well as the fact that an airport terminal is wholly different from a post office sidewalk, *see id.* at 584-87, I believe that the panel's reading of *Kokinda* will, at a minimum, constitute bad law for our circuit and, at most, have extremely deleterious consequences for future public fora jurisprudence.

Third, I would grant rehearing to reconcile the panel's conclusion that a forum's purpose alone can determine its public or non-public status, *see Lee,* 925 F.2d at 581-82, with our circuit's longstanding doctrine that the status of a forum is determined by a complex balancing of competing factors, none of which alone is dispositive. *See Wolin v. Port of New York Auth.,* 392 F.2d 83, 89 (2d Cir.), *cert. denied,* 393 U.S. 940 (1968) (holding that a forum's status is determined by whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance").

I should suppose that rehearing en banc could be denied here on the basis that the Supreme Court is sure to grant certiorari. That, it strikes me, is not sound justification; better that our house be put in order without Supreme Court intervention.

APPENDIX E

(Operations – 2/11/88)

Kennedy International, Newark International, and LaGuardia Airports Revision to Chapter III of Airport Rules and Regulations Addition of Regulations for Non-Commercial Activity Prohibitin [sic] of Vending Machines

Currently, the conduct of individuals and organizations at all three airports are subject to the Airport Rules and Regulations. Chapter III, entitled "Commercial Activity," generally prohibits commercial activity at the airports without Port Authority consent, and prohibits specific commercial activity at the airports such as the distribution of literature, the posting of signs and the playing of musical instruments, without permission.

A recurring problem at the airports is the practice of groups and individuals using the airports as sites of organized conduct that is inconsistent with the intended purpose of the airports – the facilitation of air travel. Since these groups engage in such behavior for non-commercial purposes, such as religious observance and communication of political messages, their conduct is not regulated by the current version of Chapter III, which concerns commercial activity. Members of the International Society for Krishna Consciousness, Inc., which brought a lawsuit in Federal Court in New York in 1975 seeking access to the airports to distribute publications, solicit money and engage in related activity, currently engage in such conduct pursuant to a very limited permission granted to the organization pending the determination of the lawsuit, which is continuing.

Staff has proposed the adoption of regulations to regulate the non-commercial distribution of literature and related activity in interior public non-tenant areas of the airports. These regulations would be made Part B of Chapter III. The current regulations concerning commercial activity, as amended, would be designated Part A.

The proposed Part B prohibits conduct in interior public non-tenant areas that creates the most serious problems of congestion and pedestrian annoyance Part B prohibits leafleting, the solicitation of money and the sales of merchandise. Other non-commercial activity is prohibited to the extent that it interferes with airport operations.

The proposed Part A of Chapter III includes a provision prohibiting the installation of vending machines that sell goods in public non-tenant areas at the airports. Restroom vending machines selling personal hygiene items will not be prohibited because they satisfy passenger emergency needs.

The Port Authority has permitted vending machines to be installed in its space at the airports as a method of selling goods, but vending machines have been a disfavored method of distribution because their presence creates security, safety, congestion, aesthetics, maintenance and customer complaint problems. Over the past year, USA Today has made persistent requests to permit the installation of numerous newspaper vending machines in both Port Authority and airlines space at the airports, and has recently commenced an action in Federal Court in New Jersey to compel the Port Authority to

permit the installation of newsracks at Newark International Airport. In the course of considering USA Today's requests, staff has determined that a proliferation of such vending machines would have the adverse results of the nature described above. In the course of these deliberations, staff has determined that a uniform policy prohibiting the sale of goods by vending machines in public non-tenant areas would eliminate the undesirable effects of such vending machines in public Port Authority space at the airports. Aviation staff will consult with the airlines as to the feasibility of eliminating the sale of goods by vending machines in public areas occupied by tenants. Staff shall take all steps necessary to insure that all goods and services, including newspapers and magazines, for which there is public demand, are conveniently available to airport patrons.

Whereupon, the following resolution was unanimously adopted by the Committee:

RESOLVED, that Chapter III of the Airport Rules and Regulation is repealed and replaced by the following:

CHAPTER III

COMMERCIAL AND NON-COMMERCIAL ACTIVITY

A. Commercial activity at Port Authority air terminals is subject to the following conditions and restrictions:

1. Any permission granted by the Port Authority directly or indirectly, expressly or by implication, to any person or persons, to enter upon or use any air terminal or any part thereof (including aircraft operators, crew members and

passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of airlines, lessees and other persons occupying space at such air terminal, persons doing business with the Port Authority, its lessees, sublessees and permittees, and all other persons whatsoever whether or not of the type indicated), is conditioned upon compliance with the Port Authority rules and regulations: and entry upon or into any air terminal by any person shall be deemed to constitute an agreement by such person to comply with said rules and regulations. As used herein, compliance with Port Authority rules and regulations includes compliance with the Port Authority master security plan for the air terminal and the submittal by certified air carriers of their security programs as required by Parts 121 and 129 of the Federal Air Regulations.

2. No person shall carry on any commercial activity at any air terminal without the consent of the Port Authority.

3. No vending machines for the sale of goods shall be permitted in the public areas of Kennedy International, Newark International and LaGuardia Airports which are not occupied by a lessee, licensee or permittee. This prohibition shall not apply to vending machines in restrooms selling personal hygiene items.

4. No person shall conduct sightseeing flights at any air terminal except under permit from the Port Authority. By sightseeing flights is meant flights on which passengers are carried for hire, and which originate and terminate at the same terminal with no intermediate stops other than emergency stops.

5. No person shall use any area of an air terminal for storage of cargo or other property without permission. If, notwithstanding the

above prohibition, a person uses such areas for storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the cargo or other property removed or to cause the same to be removed and stored at the expense of the owner or consignee thereof, without liability for damage thereto arising from or out of such removal or storage.

6. Unless otherwise provided in a lease or other agreement, no person shall use any area of an air terminal (other than the public aircraft parking and storage areas), for parking and storage of aircraft without permission of the Manager. If, notwithstanding the above prohibition, a person uses such areas for parking or storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the aircraft removed or to cause the same to be removed and stored at the expense of the owner thereof, without liability for damage thereto arising from or out of such removal or storage.

7. No person shall use or occupy an operational area for any commercial purpose whatsoever except a purpose pertaining to the servicing of tenants, concessionaires, airlines, activities associated with airlines, or governmental agencies, or a purpose connected with maintenance and operation of an air terminal. Persons so authorized must carry and/or display personal identification of the type and in the manner specified by the Manager.

8. No person shall land or take off an aircraft on or from a public landing area, or use a public landing area, public ramp and apron area, public passenger ramp and apron area, public cargo ramp and apron area, or a public aircraft parking and storage area, except upon

the payment of such fees and charges as may from time to time be prescribed or agreed to by the Port Authority.

9. All charges due to the Port Authority for the use of air terminals shall be payable in cash unless credit arrangements satisfactory to the Port Authority have been made in advance or permission has been secured for payment by check.

10. No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.

11. No person shall solicit funds for any commercial purpose at an air terminal without permission.

12. No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal:

(a) sell, or offer for sale, any article of merchandise; or

(b) solicit any business or trade, including the carrying of baggage for hire and the shining of shoes or bootblacking; or

(c) entertain any persons by singing, dancing, mime, acting, juggling or playing any musical instrument.

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:

1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.

(b) The sale of distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

(d) The sale of any service.

(e) The sale of any raffle ticket or entry in a game of chance.

(f) The conduct of a game of chance.

2. The following conduct is prohibited at an air terminal:

(a) The intentional touching of any person without his or her consent.

(b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

(c) The intentional leaving of any item intended for distribution unattended.

(d) The attachment of any placard, sign, circular or other written material, on any wall, post, counter, billboard or any other surface.

(e) The erection of any table, chair, mechanical device or other structure.

Supreme Court, U.S.
FILED
OCT 8 1991
OFFICE OF THE CLERK

(2)

No. 91-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Petitioners,

vs.

WALTER LEE, Superintendent of Port Authority Police,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR P. BERG
Counsel of Record
MILTON H. PACHTER
Attorney for Respondent
One World Trade Center – 66E
New York, New York 10048
(212) 435-6830

On the Brief:
ARNOLD D. KOLIKOFF

QUESTIONS PRESENTED

The Port Authority of New York and New Jersey, the agency that operates the three major New York Metropolitan area airports, restricts the repetitive distribution of literature and solicitation of contributions to the exterior portions of the airports' terminal buildings. The restriction is imposed as a means of promoting the safe and convenient use of those buildings by air travelers and other visitors. In a suit brought by the International Society for Krishna Consciousness, Inc. ("ISKCON"), and a member thereof, the United States District Court for the Southern District of New York held that the airport terminals were public fora, and granted ISKCON summary judgment declaring the restrictions to be in violation of the First Amendment. In a partial reversal of the District Court judgment, the United States Court of Appeals for the Second Circuit held that the airport terminals were not public fora, and reversed the portion of the judgment below declaring the restriction on solicitation to the exterior of those buildings to be unconstitutional. The Court of Appeals, however, did not disturb the District Court's judgment invalidating the restriction on the distribution of literature, although neither court held that the restriction was not a reasonable means of serving the legitimate interests of the Port Authority as operator of the airport.

ISKCON has filed a Petition for a Writ of Certiorari with respect to the Second Circuit's reversal of the District Court judgment declaring the restriction on solicitation to be unconstitutional. The respondent to ISKCON's petition did not file a response to the petition identified as such, but filed a Cross-Petition for a Writ of Certiorari with respect to the Second Circuit's affirmance of the District Court judgment invalidating the restriction on the distribution of literature. The Cross-Petition has been assigned Docket Number 91-339.

This Court has since requested that the respondent file the within formal response to the petition.

The Petition for a Writ of Certiorari presents the following questions:

1. Are the interiors of airport terminals, which have as their sole purpose the facilitation of air travel, public fora because of the presence of support services for air travelers and large numbers of visitors in the terminals?

2. Is a restriction on the repetitive solicitation of money to the exterior portions of an airport terminal building, which serves thousands of airline passengers and other air travel-related visitors each day, a reasonable means of serving the airport operator's interest in promoting the safe and convenient use of the airport by air travelers?

LIST OF PARTIES

Respondent Walter Lee was Superintendent of the Port Authority Police when this action was commenced. The Superintendent of Port Authority Police is an employee of The Port Authority of New York and New Jersey ("the Port Authority"). The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District including the three major New York metropolitan area airports — John F. Kennedy International Airport, LaGuardia Airport and Newark International Airport. The Port Authority has no subsidiaries other than the Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary which owns and operates the PATH railroad line between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioner International Society for Krishna Consciousness, Inc. ("ISKCON") is organized as a not-for-profit religious organization. Petitioner Brian Rumbaugh is a member of ISKCON.

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BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix to Petition for Writ of Certiorari, at 1-28) is reported at 925 F.2d 576 (2d Cir. 1991). The opinion of the District Court (Appendix to Petition for Writ of Certiorari, at 30-48) is reported at 721 F. Supp. 572 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1991. A Petition for Rehearing with Suggestion for Rehearing En Banc was timely filed, and was denied on April 25, 1991. The Petition for a Writ of Certiorari was received on July 26, 1991. The respondent did not file a formal response to the Petition for a Writ of Certiorari identified as such, but filed a Cross-Petition for a Writ of Certiorari. The Cross-Petition was filed on August 26, 1991, and was assigned Docket Number 91-339. By letter dated September 9, 1991, this Court requested that a formal response to the Petition for a Writ of Certiorari be filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, Part B, as amended by resolution dated February 11, 1988, provides in pertinent part as follows:

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.
>
> . . . "

STATEMENT OF THE CASE[1]

(A)

Petitioners, plaintiffs below, are the International Society for Krishna Consciousness, Inc. ("ISKCON") and a member thereof.[2] ISKCON members perform a practice known as *sankirtan*, which consists of " 'going into public places, disseminating religious literature and soliciting funds to support the religion.' " (A 3, 31).[3] The primary purpose of the activity appears to be fundraising (A 3). Plaintiffs instituted the suit at bar to challenge regulations whose effect was to restrict the practice of *sankirtan* at the three major airports serving the New York City metropolitan area, John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark") (A 2, 30).

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[1] The Statement of the Case in the Cross-Petition for Certiorari is reproduced here for the convenience of the Court.

[2] Hereinafter, the Petitioners will be referred to as "Plaintiffs".

[3] "A" followed by numerals refers to pages of the Appendix to the Petition for a Writ of Certiorari ("Petition").

Respondent Walter Lee was Superintendent of the Port Authority Police when this suit began.[4] The Superintendent is an employee of The Port Authority of New York and New Jersey in command of the police force of the Port Authority. The Port Authority was created in 1921 by a congressionally-consented-to interstate compact between the States of New York and New Jersey to develop public transportation, terminal and other facilities of commerce (A 4, 30).[5] At the present time, the Port Authority owns and/or operates thirty-seven (37) such facilities, including John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark"). These three airports constitute the busiest and most heavily used airport complex in the world. In 1986, they served approximately 79 million travelers, constituting about eight percent of United States' domestic flights, and over one-half of United States' trans-Atlantic flights. It is estimated that the passenger load of the airports will increase to 110 million by the year 2000 (A 4).

The Port Authority is charged with operating the three airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws §6634 (McKinney 1979); N.J. Stat. Ann. §32:1-35.4 (West 1963). In accordance with its statutory authority, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas (A 4). The Port Authority retains complete

[4] Walter Lee no longer holds this position. The caption has not been amended to substitute another named defendant. *See*, Petition at 3 n.3.

Hereinafter, the Respondent will be referred to as "Superintendent".

[5] The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963).

control over unleased areas. This action originally concerned restrictions in all areas of the airport, both leased and unleased. However, over the course of the litigation, Plaintiffs' claims with respect to leased areas were settled,[6] and only the claims with respect to the unleased areas of the Airports within Port Authority control remained for determination by the District Court (A 4, 32).[7]

The Port Authority airports' sole purpose is to facilitate air travel (A 12-13, 43, 44). This purpose is reflected in a variety of airport characteristics: user-fee financing, pedestrian congestion, the existence of captive audiences, physical separation from surrounding communities and special security concerns (A 12-14, 44-47). The air terminals contain facilities which directly and indirectly serve air travelers. The facilities which indirectly serve air travelers are restaurants, snack stands, postal facilities, currency exchange facilities, bookstores and similar facilities (A 5, 40). Although access to these facilities is not restricted, virtually all persons who visit the airports do so for air-travel-related purposes, *i.e.*, for air travel itself, to meet an air traveler or to perform a service for an airline or airport terminal service provider (A 5, 12-13).

[6] The settlement agreement between the Plaintiffs and the airlines provided, *inter alia*, that Plaintiffs would release the airlines from any claim at law or equity arising from the airlines' refusal to allow Plaintiffs to distribute literature or solicit contributions in airline terminal space, and that Plaintiffs would enjoy the same access to such space that an unrelated party would be granted by reason of a final judgment in subsequent litigation against the airlines (Joint Appendix, at 319, 320).

[7] Hereinafter, for the sake of brevity, the phrase "air terminals" will refer only to Port Authority controlled areas, the subject of Plaintiffs' remaining claims.

The Port Authority has adopted regulations to address the adverse effects of leafleting and solicitation upon the safe, efficient and convenient use of the airports by airline passengers. Pedestrian congestion presents a particularly acute problem at the Port Authority airport terminals. Much of these facilities were built before the introduction of wide-body, high passenger load aircraft; and air travelers, who are often burdened with baggage, and may be hurrying to a plane or ground transportation, are more adversely affected by congestion than pedestrians in other contexts (A 14).

Certain of the Port Authority regulations effectively prohibit the performance of *sankirtan* in the interior portions of the air terminals. These regulations provide in pertinent part as follows:

> "[B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:]
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds."[8] (A 6).

[8] Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, Part B, Section 1, as amended by resolution dated February 11, 1988.

(B)

After preliminary proceedings described in the opinions below, the District Court granted Plaintiffs summary judgment, holding that the Port Authority's regulations prohibiting the continuous and repetitive distribution of literature and solicitation of contributions inside the air terminals violated the United States Constitution based in principal part upon the District Court's determination that the air terminals are public fora (A 47-48).

The District Court determined the standard to be applied to the Port Authority's regulations using this Court's now familiar public forum analysis of *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985):

> "[Under public forum analysis, i]n both traditional and designated public fora, the government may not impose content-based restrictions on First Amendment activity unless those restrictions are narrowly tailored to further a compelling state interest. However, the government may impose in those fora content-neutral time, place and manner restrictions, provided such restrictions serve significant governmental interests and leave adequate alternative channels of communication open. In a non-public forum, by contrast, the government may restrict expression, so long as the restrictions are reasonable and do not discriminate against certain viewpoints." (A38 (citations omitted)).

The District Court noted that "[i]t is now well settled that streets, parks and sidewalks are traditional public fora[,]" (A 38) and, that designated public fora are places "which

the 'State has [intentionally] opened for use by the public as a place for expressive activity.'" (A 38 (brackets in original)).

The District Court held that the air terminals were traditional public fora because they possessed the characteristics of a "bustling metropolitan boulevard" (A 40). The court rejected the Superintendent's contention that public streets and parks are unique species of public property and that airports should not be classified with them as traditional public fora (A 41). The court also rejected the Superintendent's argument that the sole purpose of the air terminals as facilitators of air transportation and the attendant characteristics of airport terminals, including their design, financing, planning, conditions of congestion, presence of captive audiences, isolation from surrounding communities and security problems, distinguish airport terminals from city streets. According to the District Court, these characteristics do not take airports out of the traditional public forum classification, and, to the extent that First Amendment activity would interfere with airport operations, such issues should be addressed in time, place and manner restrictions (A 43-47). Accordingly, the District Court granted Plaintiffs' motion for summary judgment (A 48). The Superintendent appealed to the Second Circuit.

(C)

The Court of Appeals reversed the judgment below in part, holding that the Port Authority rules at issue were valid insofar as they prohibited solicitation within the air terminals, but were invalid insofar as they prohibited the distribution of literature within the air terminals. The Court of Appeals' decision was based in large part upon this Court's decision in *United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3115 (1990), which was issued after the case at bar was heard in oral argument. *Kokinda* held that the Postal Service's prohibition of the solicitation of funds on a walkway outside of a post office was valid.

After reviewing the facts of this case and the public forum doctrine in general (A 1-6), the Court of Appeals began its discussion of the case at bar by considering whether the airport terminals were public fora. The Second Circuit stated that prior to the decision in *Kokinda*, it would have classified the air terminals as public fora because the established authority in other circuits had classified airports as pubic fora, and the court was reluctant to create a conflict when the view of other circuit courts was not unreasonable. However, the court below continued, "*Kokinda*[ ] has altered public forum analysis and . . . we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (A 10-11).

Under the Second Circuit's analysis, *Kokinda* upheld the prohibition of solicitation on the post office walkway based upon two parallel rationales. First, in the plurality opinion written by Justice O'Connor,[9] the prohibition was valid because the walkway was not a public forum since it "was not a public passageway designed 'to facilitate the daily commerce and life of the neighborhood or city' but was intended 'solely to assist postal patrons' to get access to postal services. [110 S.Ct.] at 3123." (A 11). And, second, in the concurring opinion of Justice Kennedy, solicitation was sufficiently disruptive conduct so that it could be prohibited irrespective of whether the walkway was a public forum (A 12).

According to the Court of Appeals, the passageways in the Port Authority's terminals are similar to the walkway in *Kokinda* because both the airport terminals and the post

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[9] The plurality opinion written by Justice O'Connor was joined in by the Chief Justice and Justices White and Scalia. *United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3117 (1990).

office walkway are intended solely to facilitate a particular class of transactions — air travel in the case of the airport terminal passageways, postal activities in the case of the post office walkways. People do not use the passageways in air terminals to meet friends for lunch, window-shop, take the air, or engage in any of the other purposes for which city streets are used. The passageways are used solely for air-related purposes by travelers, persons connected with air travelers, or employees of businesses serving air travelers (A 12, 13). The similar appearances of the airport passageways and city streets were held to be of no moment in view of the special purpose of the airport (A 13).

Furthermore, the majority stated, the Port Authority's anti-solicitation restriction served precisely the same purpose as the restriction upheld in *Kokinda*. Like the Postal Service in *Kokinda*, the Port Authority has an interest in protecting its airport patrons from the disruption of in-person solicitation (A 13-14). In fact, the Court of Appeals held that solicitation would have a greater disruptive effect in the air terminal than in a post office walkway because of the nature of the air terminals. Specifically, the Second Circuit held that pedestrian congestion is one of the greatest problems of the air terminals because much of the facilities in question were built before wide-body aircraft, and air travelers are often weighted down by cumbersome baggage while hurrying to catch a plane or to arrange ground transportation (A 14).

Although the Court of Appeals upheld the validity of the ban on solicitation, the Court of Appeals reached a different conclusion with respect to the ban on leafleting inside the air terminals. Relying upon Justice Kennedy's characterization of solicitation as a far more disruptive activity than leafleting, the Second Circuit held that the Port Authority's ban on leafleting in the air terminals was not constitutional (A 14-15).

Chief Judge Oakes dissented, stating that in his view the airport terminals were public fora. According to the dissent, *Kokinda* did not announce a new rule under which a site's public forum status was dependent upon the site's purpose (A 17-20). In Chief Judge Oakes' view, a number of factors, especially airport passageways' similarity to public streets, caused the airport terminals' passageways to have the status of public fora (A 21). Chief Judge Oakes agreed with the District Court that those characteristics of the airport terminals' passageways which result from their purpose of facilitating air travel do not warrant their classification as nonpublic fora (A 22-26). The dissenting opinion concluded that the District Court's judgment should be upheld because neither the ban on leafleting nor the ban on solicitation satisfied the requirements for regulation of expressive activity in a public forum (A 27-28).

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Plaintiffs argue that the Court of Appeals erred in holding that the airport terminals are not public fora, and that repetitive solicitation may be prohibited from within their interiors as a reasonable regulation that is viewpoint-neutral, that these determinations create a conflict among the circuits, and raise important issues of law. In response to the contentions of Plaintiffs, the Superintendent respectfully submits that the Court of Appeals correctly applied the public forum doctrine developed by this Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), in holding that the airport terminals are not public fora, and that, as a consequence, repetitive solicitation may be prohibited from within their interiors as a reasonable, viewpoint-neutral regulation.[10] The Superintendent, however, does not disagree that the decision of the Court of Appeals created a conflict among the circuits as to the public forum status of airport terminals, and, as a consequence, a conflict as to the standards to be applied to determine the constitutionality of restrictions on expressive activity in an airport terminal. Nor does the Superintendent disagree that such issues present important questions of law.

[10] The Superintendent contends in his Cross-Petition for a Writ of Certiorari that the failure of the Court of Appeals similarly to apply the reasonable, viewpoint-neutral test to the Port Authority's leafleting regulations is erroneous since it is inconsistent with this Court's public forum jurisprudence.

1. The Court of Appeals correctly held that the airport terminals are not public fora, and that repetitive solicitation may be prohibited from within their interiors.

The Court of Appeals correctly applied the principles of forum analysis in holding that the airport terminals are not public fora, and that, as a consequence, repetitive solicitation may be prohibited from within their interiors as a reasonable, viewpoint-neutral regulation.

Since the 1974 decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court has relied upon public forum analysis to decide cases in which persons have sought to use government property for expressive activity in violation of rules which restrict or prohibit the activity. *See, United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. at 3115, 3119 (1990). In *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*, this Court for the first time set forth the public forum doctrine as a comprehensive analytical model for determining the extent to which a government agency must permit expressive activity in a publicly-owned facility. The model differentiated among a traditional public forum, a designated public forum, and a nonpublic forum. 460 U.S. at 45-46. This Court has consistently applied this model to resolve public forum cases. *See, e.g., United States v. Kokinda*, ____ U.S. ____, 110 S.Ct. 3115 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

Under the *Perry* model, a government may not constitutionally prohibit expressive activity in a traditional public forum or a designated public forum unless the prohibition is necessary to serve a compelling government interest.

Time, place and manner regulations may be enforced in a traditional public forum only if the regulations are reasonable, narrowly tailored and leave open alternative means of communication. In contrast, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves the forum for its "intended purposes" is fully constitutional as long as it does not discriminate against expressions of a particular viewpoint. 460 U.S. at 46, 49.

The Court of Appeals applied these principles to a setting which has not been the subject of forum analysis by this Court, airports,[11] and held that the airport terminals are not public fora.

Under the public forum principles enunciated by this Court, the Court of Appeals was correct in holding that the airport terminals are not public fora. A public forum is a "place[] which 'by long tradition or by government fiat ha[s] been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802, *quoting Perry Education Ass'n v. Perry Local*

[11] Although this Court granted certiorari in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1982), to review, *inter alia*, the public forum status of an airport (*id.*, at 577 (White J., concurring, joined by the Chief Justice)), the case was resolved on the different issue of the facial validity of a Los Angeles International Airport regulation (*id.*, at 573-4).

The only case decided by this Court concerning the public forum status of any transportation facility was *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, this Court held that the public transit system of Shaker Heights, Ohio, was *not* a public forum, and upheld the city's prohibition of political advertising even though that policy discriminated among advertisers based on the content of their speech. *Id.*, at 301-302.

Educators' Ass'n, 460 U.S. at 45.[12] The Port Authority airport terminals purpose is *not* "public assembly and debate." Rather, they have as their sole purpose the facilitation of air travel.

All airport functions and services are either directly or indirectly related to facilitating air travel[13] by effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft (A 4, 13, 14). The Port Authority airports' sole purpose of facilitating air travel is reflected in the airports' operations, financing, lack of integration with neighboring communities, captive

[12] This definition echoes the description of the traditional public fora of streets and parks set forth in an oft-quoted passage by Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

The only public places specifically identified by this Court as traditional public fora are streets, sidewalks, and parks. *See, Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45. A college campus has been described as possessing "many of the characteristics of a traditional public forum", *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 803, *citing Widmar v. Vincent*, 454 U.S. 263 (1981), because it serves as a "marketplace of ideas." *Widmar v. Vincent*, 454 U.S. at 267 n.5 (citations omitted).

[13] Indirect aids to air travel at airports include refreshment stands, restaurants and retail shops, which are provided by airport operators for the comfort and convenience of air travelers.

audiences, and special congestion and security problems (A 4, 13, 14, 43-47). Thus, the air terminals do not share the public forum characteristics of being "a necessary conduit of a locality's citizens" or a place where people can "enjoy the open air of the company of friends and neighbors in a relaxed environment". *United States v. Kokinda*, 110 S.Ct. at 3120, *quoting Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).[14]

In reversing the District Court, the Court of Appeals rejected the notion that airport terminals should be classified as public fora based on the mere fact that access to airport terminals is not restricted. As stated by this Court in reversing a determination that a facility was a public forum,

> "The Court of Appeals was mistaken...in thinking that...whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle...has never existed, and does not exist now." *Greer v. Spock*, 424 U.S. 824, 826 (1976); *see also, United States v. Kokinda*, 110 S.Ct. at 3120; *United States v. Grace*, 461 U.S. at 177.

In sum, the Court of Appeals correctly held that the Port Authority airport passenger terminals are nonpublic fora because their sole function is the facilitation of air travel — not communication.

Since the Court of Appeals was correct that the air terminals are not public fora, it follows that the Court of Appeals was correct in holding that the prohibition of solicitation within the air terminals is valid.

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[14] Hereinafter, "ISKCON" in citations will refer to "International Society for Krishna Consciousness, Inc." and similarly named parties.

A restriction on expressive activity in a nonpublic forum, such as the Port Authority's restriction on solicitation, is valid if it is viewpoint-neutral and reasonable in light of the purpose of the forum. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 806. The Port Authority restriction on solicitation easily satisfies these two criteria.

First, the Port Authority restriction on solicitation satisfies the threshold requirement that it be viewpoint-neutral. Indeed, the restriction is not only viewpoint-neutral, but is also content-neutral because all solicitation, whatever the religious, political or social content, is treated identically. *United States v. Kokinda*, 110 S.Ct. at 3124; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295; *Heffron v. ISKCON*, 452 U.S. at 649.

Second, the Port Authority restriction on solicitation satisfies the requirement that the restriction be reasonable in light of the purpose served by the forum. *United States v. Kokinda*, 110 S.Ct. at 3121; *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 473 U.S. at 806. As recognized by both the District Court and the Court of Appeals, the purpose of the Port Authority airports is the facilitation of air travel (A 5, 13, 14, 43, 47).[15] Thus, a prohibition on solicitation in the airport terminals is valid for this reason alone, since, as this Court stated in *Perry*:

> "[W]hen government property is not dedicated to open communication the government may — *without further justification* — restrict use to those who participate in the forum's official

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[15] Although the District Court did not find that the purpose of the airports rendered the air terminals to be nonpublic fora, the District Court did not reject the contention that air travel *is* the purpose of the airports (A 47).

business." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 53 (emphasis added, footnote omitted).

Furthermore, it is reasonable for the Port Authority to impose the restriction at issue in furtherance of its legitimate interests in controlling the problems resulting from the solicitation of money at one of "society's chokepoints" (A 14). Solicitation is a form of behavior that has an especially disruptive effect on pedestrian traffic. *United States v. Kokinda*, 110 S.Ct. at 3123; *Heffron v. ISKCON*, 452 U.S. at 653. And, as held by the Court of Appeals, the problem of congestion is especially acute at the Port Authority airports (A 14).

Thus, the Court of Appeals correctly held that the Port Authority's prohibition on solicitation was a valid means of addressing the Port Authority's interest in controlling pedestrian congestion. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 ("The . . . decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." (emphasis in original)).

2. The decision of the Court of Appeals has created a conflict among the circuits.

The Superintendent does not dispute the contention of Plaintiffs that the decision of the Court of Appeals has created a conflict among the circuits as to the public forum status of airports, and, as a consequence, as to the standard to be applied to determine the constitutionality of restrictions upon expressive activity in airport terminals. However, as set forth above, the Superintendent respectfully submits that only the decision of the Second Circuit is consistent with forum analysis as enunciated by this Court.

To the extent that the other decisions applied forum analysis at all, they relied on factors which this Court has held are not determinative of public forum status, such as public ownership or public access. *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973).[16]

3. The decision of the Court of Appeals presents issues of national importance.

The Superintendent also does not disagree with the Plaintiffs' contention that the decision of the Court of Appeals involves important issues of law. The issue of the extent to which airport operators may constitutionally exercise control over expressive activity in their airports continues to be of national importance. Airports are very specialized, complex facilities that play a vital role in providing transportation to the nation. Since the decision below addresses the ability of airport operators to adopt and enforce rules for the safe, efficient and effective management of the nation's airports, the decision below involves legal issues of national importance.

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[16] Other circuit court decisions holding airports to be public fora have not set forth a rationale for using that classification, *see*, *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979), or merely rely on prior decisions so holding. *See*, *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 794 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978).

The proliferation and persistence of litigation concerning the ability of an airport operator to restrict or prohibit leafleting, solicitation and other expressive activity in air terminals reflects the continuing desire of airport operators to exercise their legitimate authority over airports with respect to expressive activity as part of their efforts to provide safe, convenient and efficient facilities to air travelers. Both this brief and the Petition For A Writ Of Certiorari set forth the great number of reported decisions concerning the efforts of airport operators to regulate such behavior in airport terminals in the exercise of their common obligation to facilitate air travel.

Significantly, this Court previously acknowledged the importance of the issue of the extent to which airport operators can control expressive activity when it granted a writ of certiorari in *Board of Airport Commissioners v. Jews for Jesus, Inc., supra*. Although the *Jews for Jesus* case was resolved on the different issue of the facial validity of a Los Angeles International Airport regulation (482 U.S. at 573-4),[17] the issues upon which certiorari was granted

[17] The Los Angeles International Airport regulation at issue in *Jews for Jesus* provided, *inter alia*, that the Central Terminal Area of the airport "is not open for First Amendment activities by any individual and/or entity". *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1982). This regulation was held to be invalid irrespective of the public forum status of the airport because it was so broad as to prohibit *all* protected expression, including activity that would have no potential adverse effect on congestion or airport functions, such as reading. *Id.*, at 574-75.

The Los Angeles regulation is totally dissimilar to the Port Authority regulations at issue herein. Unlike the Los Angeles provision, the regulations at bar are narrowly drawn and are specifically directed at activities that have direct impact upon congestion, and thus, upon airport operations.

were the public forum status of the airport and the effect of that status on the ability of the airport operator to control expressive activity in the airport. *Id.*, at 577 (White J., concurring, joined by the Chief Justice); 55 U.S.L.W. 3197 (1986)(questions raised on petition).[18]

[18] "I join the Court's opinion but suggest that it should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum. That issue was one of the questions on which we granted certiorari. . . ." 482 U.S. at 577 (1982)(White J., concurring, joined by the Chief Justice).

CONCLUSION

The Court of Appeals correctly held that the Port Authority airport terminals are not public fora, and, therefore, repetitive solicitation may be prohibited from within their interiors. The decision of the Court of Appeals created a conflict among the circuits as to the public forum status of airport terminals, and, as a consequence, a conflict as to the standards to be applied to determine the constitutionality of restrictions placed upon expressive activity in an airport terminal. Finally, the decision below addressed issues of national importance.

Dated: New York, New York
October 7, 1991

Respectfully submitted,

ARTHUR P. BERG
Counsel of Record

MILTON H. PACHTER
Attorney for Respondent
One World Trade Center—66E
New York, New York 10048
(212) 435-6830

On the Brief:

ARNOLD D. KOLIKOFF

(3) (3')

Nos. 91-155 & 91-339

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Petitioners/Cross-Respondents,

—v.—

WALTER LEE,

Respondent/Cross-Petitioner.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Daniel A. Farber
University of Minnesota Law School
285 Law Center
229 19th Avenue South
Minneapolis, Minnesota 55455
(612) 625-1022

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The New York Civil Liberties Union is one of its state affiliates.

Throughout its 70 year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment. The ACLU has, therefore, appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*. Because this case raises an important First Amendment issue of organizational concern to the ACLU, we respectfully submit this brief as *amici curiae* for the Court's consideration.

STATEMENT OF THE CASE

The International Society for Krishna Consciousness (ISKCON) is a not-for-profit religious corporation whose members perform a religious ritual known as "sankirtan," which involves "going into public places, disseminating religious literature and soliciting funds to support the religion." *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 577 (2d Cir. 1991). The religious *bona fides* of this practice are not at issue in this case. What is at issue is plaintiffs' right to distribute religious literature and solicit contributions at the three major airports serving New York City.[2] These terminals

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] As Judge Irving Kaufman has explained, to ban these activities prevents ISKCON's members "from fulfilling a central duty of their faith, removing the 'theological heart' of the religion." *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981).

have much the same character as many downtowns. For example, the lobby of one building includes "two restaurants, two snack stands, a bar, a postal substation and postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, two currency exchange facilities, a dental office, and an area for the display of art exhibits." *Id.* at 578.

After fifteen years of litigation, the issues in dispute have been significantly narrowed. Defendant is willing to allow solicitation on the sidewalks outside the terminal buildings, while plaintiffs' claims relating to leased areas of the airport (such as the gates) have been settled.[3] In the unleased areas, defendant's regulations prohibit the sale of merchandise, distribution of literature, or solicitation of funds, if those activities are "conducted by a person to or with passers-by in a continuous or repetitive manner."[4]

This restriction of plaintiffs' First Amendment rights was struck down in its entirety by the district court. 721 F.Supp. 572 (S.D.N.Y. 1989). A divided panel of the Second Circuit affirmed in part and reversed in part, holding that solicitation could be banned but the distribution of literature could not. In reaching this split decision, the court of appeals concluded that an airport terminal is not a public forum, 925 F.2d at 580, although conceding that the "well-established" authority in other circuits is to the contrary. *Id.* Its decision rested on the view that *United States v. Kokinda*, __ U.S. ___, 110 S.Ct. 3115 (1990), had "altered public forum analysis," 925 F.2d at 580.

On January 10, 1992, this Court granted plaintiffs' petition for *certiorari* and defendant's cross-petition.

[3] Most of the space at New York's three metropolitan airports is leased to commercial airlines. The unleased areas are controlled by the Port Authority itself and include the International Arrival Building at Kennedy Airport, the Central Terminal Building at LaGuardia Airport, and the North Terminal Building at Newark Airport. 925 F.2d at 578.

[4] Although the point has not been raised in this case, *amici* believe that that "repetitive manner" standard is unconstitutionally vague.

SUMMARY OF ARGUMENT

The majority below struggled to follow the test first announced by this Court in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Perry* created a tripartite framework for evaluating regulations of speech on government property. Under *Perry*, the degree of judicial scrutiny depends on whether the property in question is: (1) a "traditional" public forum such as a park; (2) a "designated" forum that has been opened to the public for expressive activity; or (3) a "nonpublic" forum, which includes all other government property.

Amici believe that the court of appeals reached the wrong result even under *Perry*. More fundamentally, however, we believe that *Perry* has been undermined by later decisions and should now be abandoned. Indeed, it is a sufficient comment on the difficulty of following *Perry* that this case has already involved more than fifteen years of litigation.

Perry has three basic flaws. First, the divisions between the categories have proved elusive, as the present case illustrates. Second, the *Perry* test lacks any foundation in the language, original understanding, or purposes of the First Amendment. Third, the test has proved confusing and mechanistic. It focuses attention on formalistic classification rather than on the strength of the government's regulatory interest.

Because of these inadequacies, *amici* respectfully submit that *Perry* should be reexamined. We have serious doubts that content-based prohibitions can ever be upheld. *See Simon & Schuster v. Members of the New*

York State Crime Victims Board, __ U.S. __, 60 U.S.L.W. 4029, 4034-35 (Dec. 10, 1991)(Kennedy, J., concurring). At a minimum, however, "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981). More specifically, the government should be required to show that the expressive activity it seeks to ban is "basically incompatible with the normal activity of [the] particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). For example, a regulation of speech on school property should only be justified by the need to avoid disruption of the educational process. *See Tinker v. Des Moines School District*, 393 U.S. 503 (1969). Such an analysis, we submit, is no more than commonsense.

The airport regulation at issue in this case cannot survive this functional analysis or any other serious First Amendment scrutiny. The court of appeals upheld the ban on solicitation solely on the basis of pedestrian congestion. 925 F.2d at 582. As Judge Oakes pointed out in dissent, however, "public streets and sidewalks no less than airport terminals are subject to tremendous traffic problems all over the New York metropolitan area." *Id.* at 586. No one would suggest that crowding alone would justify a ban on solicitations and leafletting in downtown New York, yet defendant's regulations are not linked to any distinguishing attribute of airport terminals. Thus, the regulations violate the First Amendment.

ARGUMENT

I. THE *PERRY* TEST, AS CONSTRUED BY THIS COURT AND OTHER COURTS, IS INCONSISTENT WITH THE ORIGINAL PREMISES OF THE PUBLIC FORUM DOCTRINE, AND HAS ALREADY BEEN ERODED BY LATER CASES

Public forum doctrine has been sharply criticized by members of this Court,[5] other federal judges,[6] and numerous legal scholars.[7] Just two years ago, four Justices joined in an opinion questioning whether public forum doctrine "serves to obfuscate rather than clarify the issues at hand." *United States v. Kokinda*, 110 S.Ct. at 3127 (Brennan, J., dissenting). The present case highlights the wisdom of that observation and provides the opportunity to reappraise the continued viability of the

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[5] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985)(Blackmun, J., joined by Brennan, J., dissenting); *id.* at 833 (Stevens, J.)(expressing skepticism about the public forum doctrine); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976)(Brennan, J., dissenting).

[6] *See, e.g., Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 & n.7 (5th Cir. 1989)(criticizing "formulaic application of the public forum doctrine" and citing commentators' warnings that "rigid application of public forum analysis threatens to obscure important first amendment issues").

[7] *E.g.*, L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Post, "Between Governance and Management: the History and Theory of the Public Forum," 34 U.C.L.A. L.Rev. 1713, 1715 (1987); Stone, "Content-Neutral Restrictions," 54 U. Chi. L.Rev. 46, 93-94 (1987); Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L.Rev. 1, 46-49 (1986); Dienes, "The Trashing of the Public Forum: Problems in First Amendment Analysis," 55 Geo. Wash. L.Rev. 109 (1986); Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication," 70 Va. L.Rev. 1219, 1220-24 (1984).

Perry test.

Current public forum doctrine is a relatively recent innovation. Prior to 1970, the phrase "public forum" had appeared in only two opinions of this Court, and it was used only seventeen times in the 1970s.[8] In its present version, therefore, public forum doctrine is largely a phenomenon of the 1980s.

Given the fact that public forum doctrine is often invoked today to justify restrictions on speech, it is useful to remember that the doctrine originated in an effort to increase the constitutional protection for free expression.[9] In a famous dictum in *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), Justice Roberts spoke of the special historic role of streets and parks as forums for public debate. His purpose, however, was not to indicate that freedom of speech was less important at other locations. Rather, he referred to the special status of streets and parks only to rebut the notion -- then arguable but now clearly defunct -- that the government has unrestricted authority as a landowner to control speech on its own property.[10]

Regulation of speech in public places once again became an important issue in the 1960s and early 1970s. In a series of cases, the Court attempted to define the contours of government regulation of speech on public

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[8] *See* Farber & Nowak, *supra* note 7, at 1221-22.

[9] Justice Marshall noted this inconsistency between the origins of the doctrine and its current use in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 147-48 (1981)(Marshall, J., dissenting).

[10] *See* Post, *supra* note 7, at 1721-24. Professor Kalven emphasized this aspect of the Roberts dictum in his classic article, "The Concept of the Public Forum: *Cox v. Louisiana*," 1965 Sup.Ct. Rev. 1.

property.[11] Although these cases remain useful sources of guidance, it was only in the early 1980s that a test crystallized in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37. Thus, the *Perry* test is by no means a long-standing pillar of the law.

Perry divides government property into three categories, each with its own detailed set of First Amendment rules. In a traditional public forum, the government "may not prohibit all communicative activity," and can only enforce content exclusions based on compelling state interests. *Perry* also recognizes two other forum categories. In a designated public forum, where the state has voluntarily allowed public communication, the same rules apply as in the traditional public forum, except that the government retains the power to close a designated forum completely. The final category, which includes most government property, consists of nonpublic forums. In this residual category, the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 45-46.

As one commentator has observed, neither *Perry* nor later cases "articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories."[12] The language of the First Amendment does not contain even the slightest hint of this tripartite scheme. Nor does the *Perry* opinion refer to any evidence of original intent that might serve to explain its

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[11] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

[12] Post, *supra* note 7, at 1715-16 (footnote omitted).

rigid conceptual framework.

On its face, the *Perry* analysis seems only distantly related to the purposes of the First Amendment. Special protection is given to speech on property that "has been traditionally open to the public for expressive activity." *Id.* at 45. But why should newer kinds of public spaces automatically be deemed less open to First Amendment activity than older varieties? The fact that a certain kind of government property has been used for expressive purposes for many years is undoubtedly relevant. Yet, unless the First Amendment is to be reduced to a branch of the doctrine of adverse possession, such past history cannot be decisive. As Dean Bollinger has said of the public forum doctrine:

> [N]one of this really provides us with an intelligible and acceptable solution to how much public property must be subject to the public forum rules, given the prior decision to make streets and parks conform to those rules. History is a rational reason only to the extent that one can give some other reason why what has or has not been should matter. By itself it is meaningless, and the truth is that we do not rely on it consistently.[13]

It is equally unclear why the government's decision to open property for expressive uses should work a radical transformation in the test applied to that property. The perverse result is that if the government is wholly indifferent or hostile to free expression, it has the benefit of reduced constitutional scrutiny,[14] but it loses that

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[13] Bollinger, "Commentaries: The Tolerant Society: A Response to Critics," 90 Colum. L.Rev. 979, 997 (1990).

[14] *See Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817, 831 (9th Cir. 1991)(Norris, J., dissenting)(*en banc*).

benefit if it makes any affirmative efforts to promote free expression.

Because the *Perry* Court justified its test solely by reference to previous cases, *Perry* is best understood as an effort to synthesize the Court's prior holdings. That synthesis has not, however stood the test of time. To the contrary, later cases have substantially undermined the *Perry* test in three regards.

First, *Perry* no longer governs a broad range of First Amendment issues. This Court has increasingly applied a single standard in assessing the validity of time, place and manner regulations.[15] And *Perry* itself requires strict scrutiny of viewpoint-based regulations even in nonpublic forums. 460 U.S. at 46. Thus, at best, the *Perry* categories only remain relevant for judging government regulations that are content-based but viewpoint-neutral.

Second, the middle category of designated public forums has virtually evaporated. According to the *Kokinda* plurality, a designated forum exists only if the government has "expressly dedicated" the property to speech activity, 110 S.Ct. at 3119, and is not created merely because the government has permitted speech activities to take place on its property, *id.* at 3121. Furthermore, even if the government property "has been dedicated to some First Amendment uses . . . regulation of the reserved non-public uses would still require application of the reasonableness test." *Id.* *Kokinda* thus reinforces the scholarly view that the designated public forum referred to in *Perry* has little practical significance,[16] leaving

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[15] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984)(general test for content-neutral regulations "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions" in public forum).

[16] *See* Post, *supra* note 7, at 1756-57.

only two of the original three categories intact.

Third, according to the *Perry* test, the defining characteristic of the traditional forum is that "[i]n these quintessential public forums, the government may not prohibit all communicative activity." 460 U.S. at 45. More recently, however, this Court has observed that even in a nonpublic forum, "an absolute prohibition on speech" is impermissible. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). Thus, what was supposed to be the defining trait of the traditional forum -- the government's inability to prohibit expressive use of the property -- turns out to apply to the other categories as well.

In short, a mere decade after *Perry*, its analytic scheme lies in tatters. It can and should be reconsidered.

II. THE *PERRY* TEST HAS ONLY SERVED TO CONFUSE FIRST AMENDMENT ANALYSIS

Kokinda illustrates the extent to which public forum doctrine has confused First Amendment analysis.[17] Eight

[17] As Professor Tribe has observed, "many recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification." L. Tribe, *supra* note 7, at 987. For example, in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, the issue was whether nonprofit organizations could be prosecuted for placing pamphlets in the letter boxes of private homes. A letter box might be regarded as a public forum because it is a traditional means for the public communication of stamped letters, or as a nonpublic forum because the government has reserved it for the delivery of stamped mail. The majority's ultimate resolution of the case was to say that mailboxes could be reserved for stamped letters because they were not public forums; the reason they weren't public forums was that the government had re-
(continued...)

Justices reached the issue of whether a post office sidewalk was a public forum. They split evenly on this recondite issue -- a clear indication of the practical unworkability of the *Perry* approach. More importantly, despite the attention given in each of the opinions to this issue, public forum analysis was in fact irrelevant to the ultimate position taken by any member of the Court. The plurality viewed the regulation as content-neutral, 110 S. Ct. at 3124. Justice Kennedy concluded that the regulation was valid even if the sidewalk was a traditional public forum. *Id.* at 3125-26. The dissenters, meanwhile, argued that the post office regulation was unreasonable even if the sidewalk was not a public forum. *Id.* at 3137. Thus, the proper classification of the sidewalk was quite irrelevant to the analysis of any member of the Court. It served only as a distraction and source of confusion.

In other cases, public forum analysis has led to a series of seemingly inexplicable distinctions. Perhaps there is a defensible distinction between leafletting on the steps of the Supreme Court and on the adjoining sidewalk,[18] or between an educational institution's restrictions on access to unused classrooms and to faculty mailboxes,[19] but any distinctions that exist are certainly more contextual and subtle than public forum analysis would indicate.

The present case further demonstrates the analytical inadequacy of public forum doctrine. It is clear that airport terminals are like downtown sidewalks in many re-

[17] (...continued)
served them for stamped letters. The analysis is a perfect exercise in circularity, which is why Justice White's concurrence, *id.* at 142, described the public forum analysis as "bootless."

[18] *See United States v. Grace*, 461 U.S. 171, 178-84 (1983).

[1] *Compare Widmar v. Vincent*, 454 U.S. 263 (1981), *with Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37.

spects and unlike them in other respects. But a mere list of factual similarities and differences cannot resolve the First Amendment issue. Rather, what is needed is a sensible appraisal of the *significance* of these factual differences in light of the speech interests involved.

Our objection to public forum analysis is not that it invariably yields wrong results (although it may sometimes do so), but that it distracts attention from the values at stake in a given case. Too often, the effect of public forum analysis is that, "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting). Although *amici* do not advocate *ad hoc* balancing, the point remains that the current analysis obscures more than it illuminates.

III. ANY RESTRICTIONS ON SPEECH SHOULD BE JUDGED BY THE NATURE OF THE GOVERNMENT'S INTEREST AND NOT BY THE ARTIFICIAL CATEGORIZATION OF ITS PROPERTY

As previously noted, the distinctive legal standard created by *Perry* is only dispositive when dealing with regulations that restrict the content of speech in a viewpoint neutral way.[20] Under *Perry*, such regulations are typically upheld in nonpublic forums and invalidated in traditional or designated public forums.

To the extent that the *Perry* taxonomy is meant to reflect the government's interest in the effective functioning of its offices and facilities, *amici* have no quarrel. However, contrary to the approach adopted in *Perry*, *amici* do not believe that this government interest is preordained by history or by the government's intention to open its property for expressive activity. The flaw in *Perry* is that its formalistic test discourages rather than encourages a serious examination of the government's regulatory interest.

There is a much simpler and far more straightforward approach. If content-based prohibitions are ever permissible,[21] the government must be able to demonstrate that "the characteristic nature and function of the particular forum," *Heffron*, 452 U.S. at 651, are "basically incompatible" with the speech the government seeks to ban, *Grayned*, 408 U.S. at 116. A special restriction on picketing near schools must be justified by the needs of schools; a ban on faculty mailbox use must have something to do with other demands on the mail system; a ban on airport solicitation must have some connection with the special characteristics of the airport terminal. Moreover, the government's justification must be a substantial one given the preferred status of free expression in our constitutional scheme. *See Schneider v. New Jersey*, 308 U.S. 147 (1939)(ban on handbilling not justified by government's interest in curbing litter).

The shift in emphasis from form to function more faithfully reflects core First Amendment principles. In addition, a functional test that looks to whether the particular speech is basically incompatible with other purposes for which the property is designed, would clarify First Amendment standards. It would not, however, require a radical break with the results in prior cases. In

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[20] *See* p.9, *supra*.

[21] For a cogent argument that content-based prohibitions of speech are *per se* invalid under the First Amendment, *see* Justice Kennedy's concurring opinion in *Simon & Schuster v. Members of the New York State Crime Victims Board*, 60 U.S.L.W. at 4034-35.

most public forum cases, the Court has not been content with an application of *Perry*, but has also made some attempt to consider whether a restriction on speech was linked to a particular government interest. For example, the Court has decided a series of public school cases. The "forums" involved have ranged from the sidewalk outside the school[22] to a school assembly.[23] Despite the diversity of these settings, including both traditional forums and nonpublic forums, the decisive factor in the cases has always been whether the speech in question interfered with the educational mission of the public schools.[24]

Like the *Perry* approach, a functional test also provides special leeway for speech on streets, sidewalks, and parks. It is difficult indeed to imagine how the identity of a speaker, or the subject matter of the speech, would have any connection at all with street maintenance, traffic flow, or any other government interest relating to streets. Thus, under a functional test, strict content neutrality would remain the rule in these settings.

Although a functional test might produce the same results as *Perry* in many situations, it nonetheless offers several advantages. First, a functional test is much simpler. It replaces a three-part scheme with a unified test. Second, rather than requiring courts to grapple with an esoteric classification scheme, it directs their attention to the practical reasons for a government regulation. The result should be a clearer and more consistent body of precedent. Third, a functional test gives both speakers and government authority a much more understandable guideline. The difference between a designated or limited public forum and a nonpublic forum is not easy to discern even for the members of this Court, let alone to explain to an administrator or a protester. A school's legitimate interest in preventing interference with its educational mission is something that everyone can understand, even if there is disagreement about when that interference occurs.

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[22] *See Grayned v. City of Rockford*, 408 U.S. 104; *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[23] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[24] *See* Farber & Nowak, *supra* note 7, at 1245-53.

One of the subtle harms caused by the *Perry* approach is that it actually discourages administrators from adopting clear regulations about access to government forums. Having adopted a rule that establishes a clear right to access, the government may then be faced with a claim that it has established a designated or limited public forum. If it decides the access question on an *ad hoc* basis, it avoids this risk. In contrast, a functional test encourages the implementation of clear regulations. Without a clear statement of what speech is allowed or forbidden, the government would be hard-pressed to show that a restriction is closely tied to any specific government interest.

A functional test would not require the government to throw open every bulletin board, classroom, and office building to the general public. What it would require -- and what this Court *should* require of the government if it permits content-based regulations at all -- is a clear articulation of the government interest in restricting speech at a particular location. That commonsense inquiry has been largely observed by the artificial categories imposed by the *Perry* test.

IV. DEFENDANT'S BAN ON SOLICITATION CANNOT SURVIVE FIRST AMENDMENT SCRUTINY UNDER *PERRY* OR ANY OTHER APPLICABLE TEST

In our view, defendant's ban on solicitation is properly viewed as a restriction on the subject matter of

speech -- the topic being the desirability of a charitable donation. This ban has no relationship with any peculiar feature of the airport. Busy travelers, like busy pedestrians in other locations, may prefer not to be distracted by such requests. But there is nothing about an airport that makes the subject of charitable donations in general -- or religious donations in particular -- an inappropriate subject for discussion. The regulation therefore fails a functional test because there is no connection at all between the regulation and the special needs of the particular government operation.

The solicitation regulation is equally invalid even if it is deemed content neutral. In *Ward v. Rock Against Racism*, 491 U.S. at 800, the Court made it clear that content-neutral regulations of speech must be "narrowly tailored" and cannot be "substantially broader than necessary to achieve the government's interest." As Judge Oakes pointed out in his dissent below, numerous alternatives exist to the outright ban adopted by defendant, such as badges for solicitors, limitations on the number of solicitors, or restrictions on the locations of solicitation within the terminal. 925 F.2d at 586.[25] Given that essentially the same test applies to content-neutral regulations on all government property, a ruling upholding defendant's ban on solicitation would open the door to similar regulations in any crowded public place.

Finally, defendant's ban on solicitation is clearly invalid even under *Perry*. As the court below acknowledged, every other circuit to consider the issue has concluded that an airport terminal is a public forum. *Id.* at 580. Defendant has not even begun to make a case for a ban on leafletting and solicitation on a typical sidewalk or other traditional public forum. Indeed, defendant's

[25] *See also Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Fernandes v. Limmer*, 663 F.2d 619, 633-35 (5th Cir. 1982).

regulations cannot withstand scrutiny under the *Perry* test for nonpublic forums. The essence of that test is that the government can reserve a nonpublic forum for its "intended purpose." The intended purpose of a terminal is to serve the manifold needs of the traveling public. Only by fiat can those needs can be defined to include the provision of items as diverse as haircuts and artistic displays, 925 F.2d at 578, but *not* a traveler's possible desire to make a charitable contribution or to obtain enlightenment from religious or political literature.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed insofar as it upheld defendant's ban on solicitation.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Daniel A. Farber
University of Minnesota
Law School
285 Law Center
229 19th Avenue South
Minneapolis, Minnesota 55455
(612) 625-1022

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Dated: February 10, 1992

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

Nos. 91-155, 91-339

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,

Petitioners and Cross-Respondents,

v.

WALTER LEE,

Respondent and Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park East,
Suite 3160
Los Angeles, California 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park East,
Suite 3160
Los Angeles, California 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson Street, N.W.,
Suite 520
Washington, D.C. 20007
(202) 337-2273

Counsel for Petitioners and Cross-Respondents

ARTHUR P. BERG
Counsel of Record
ARNOLD D. KOLIKOFF
MILTON H. PACHTER
Attorney for Respondent and Cross-Petitioner
One World Trade Center – 66E
New York, New York 10048
(212) 435-6830

Counsel for Respondent and Cross-Petitioner

Petitions For Certiorari Filed July 24, 1991 (No. 91-155), Aug. 26, 1991 (No. 91-339); Certiorari Granted Jan. 10, 1992

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10-30-75	2	Filed pltf's affdvt. of personal service upon defendants of: memorandum in support of temp. and prel. injunction; OSC for pre affdvt. of Barry A. Fischer and affdvt. of John Winslow, on 10-29-75.
11-28-75	4	Filed summons & Marshal's return. New York Port Authority Eastern Airlines Served: Date: By: C. Zaffarance 11-05-75 M. Tanner 11-06-75
12-19-75	8	Filed transcript of record of proceedings, dated 10-30-75.
12-24-75		Fld 1ST AMENDED COMPLT
1-22-76		Fld deft's notice of motion for an order pur to FRCP 12(b) to dismiss the complt pur to FRCP 12(b) . . . ret 2-20-76 at 10AM.
1-30-76		Fld Pltffs' OSC for leave to further amend complt & related relied . . . ret 1-30-76 at 1030 AM Rm 1106.
1-30-76		Fld Deft's Affdvt inopposition to file an Second Amended complt.
1-30-76		Fld Order that deft Eastern Air Lines is dismissed from this litigation. W/O prej and w/o costs. . . . Carter, J mn
2-3-76		Fld Second Amended Complt for Declaratory & Inj Relief.
3-12-76		Filed transcript of record of proceedings, dated 12-11-75
3-12-76		Filed transcript of record of proceedings, dated 1-30-76

5-6-76	Filed transcript of record of proceedings, dated 2-20-76
1-17-77	Fld Opinion #45525 . . . For the reasons set forth, the motion to dismiss is granted as to deft Port Authority and denied as to deft Lee. Deft Lee is given leave to renew his motion to dismiss should pltffs fail to join necessary ptys in a reasonable time. Pltffs' motion for a prel inj. is also denied . . . The foregoing shall constitute the court's findings of Fact and conclusions of law in accordance with FRCivP 52(a). . . . It is so Ordered. . . . Carter, J. mn
10-11-77	Fld memo end on bk of Motion fld 7-18-77 – The motion to amend the complt, not opposed by deft is granted. So Ordered . . . Carter, J. mn
10-27-77	FLD FIRST AMENDED COMPLT . . . Iss Subp.
11-4-77	Fld Pltffs' affdvt of personal service of AMENDED complt upon

Aeroflot Airline by Ms. Kirsnova on 11-1-77

Ozark Airlines by Mr J. Julius on 11-1-77

Aerolineas Argentinas Airline by D. Conesa on 10-28-77

Aeromexico S.A Airlines by C. Trejo on 10-28-77

Air Afrique Airline by C. Nluners on 10-28-77

Air Canada Airline by Mr. Campbell on 10-28-77

R. AirFrance Airline by Mr E. Eyt Sacaza on 10-28-77

Air India Airline by Y. Alvares on 10-28-77

Air Jamaica Airline by R. E. Gladd on 10-28-77

Air Panama Airline by P. Chempitaz on 10-28-77

Alitalia Airline by A. D. Croce on 10-28-77

Avianca Colombian Airlines by Mr. J. Thoen on 10-28-77

British Airways by T. Hill on 10-28-77

CSA Czech Airline by R. Allalouf on 10-31-77

Dominican De Aviation by E. Bauchamps on 10-25-77

Egyptair Airline *Disc. 12-28-77* by Mr A. Osman on 10-28-77

Finnair Airline by Herkert on 10-28-77

Ecuatoriana Airline *Disc. 5-15-78* by Receptionist on 11-1-77

El Al Israel Airlines Ltd by Securty Guad on 11-1-77

Icelandic Airlines Inc by R. E. Delam on 10-28-77

Iran Air by F. Kimmons on 10-28-77

Irish International Airlines by Mr. Domooe on 10-28-77

Japan Air Lines by D. Eldridge on 10-28-77

JAT Yugoslav Airlines by G. Stepanovic on 11-1-77

KLM by F. Kielman on 10-28-77

Lan Chile Airlines by Ms Migailez on 10-28-77

Lot Polish Airlines by Mr Resica on 10-28-77

Nigeria Airways by BM Duggash on 10-31-77

Olympic Airways by P.A. Postolidis on 10-28-77

Pakistan Intern. Airlines by B. Bernstein on 10-28-77

Royal Air Maroc by G. Luque on 10-28-77

So. African Airways by Mr. Kornedeger on 10-28-77

Swissair by Mr. Ledermann on 10-28-77

TAP Port. Airways by M. Countnho on 10-28-77

TAROM by G. Teodoresey on 10-28-77

Varig by H. Bernardo on 10-31-77

VIASA by S. Alba on 10-31-77

Allegheny Airlines by Mr. McCahley on 10-28-77

American Airlines by D. Munoz on 10-31-77

Braniff Intern. Airways by R. de Merias on 10-31-77

Eastern Airlines by Mrs Wheelan on 10-28-77

No Central Airlines by E. O. Connor on 10-31-77

Northwest Airlines, Inc by M. O'Connell on 10-28-77

Pan Ameican World Airways by R. A. Fisher on 10-28-77

Piedmont Airlines by V. Dieringer on 10-28-77

Trans World Airlines by person authorized on 10-31-77

United Airlines by D. Armato on 10-28-77

11-15-77 Fld Deft Swissair's motion for summ judg. . . . etc. . . . ret 11-25-77-10AM

11-18-77 Fld Amended Summs with Marshal's ret.

Sabena by R. Cohen on 11-2-77

Southern Airways by P. Ingham on 11-1-77

Air New England by N. Ashley on 11-1-77

Lufthansa German Airlines by D. Langon on 11-1-77

N.Y. Airways, Inc by J. Walsh on 11-1-77

Scandianavian Airlines Sys. by L. Rizzo on 11-2-77

Iberia Airlines of Spain by Otto on 11-2-77

Trans Mediterranean Airway by G. Ferrari on 11-7-77.

11-21-77 Fld Affdvt of Service of Complt & Summs upon:
Delta Airlines by Ms B. Langman on 11-4-77
Ozark Airlines by Ms D. Rodetis on 11-4-77

11-30-77 Fld Pltffs' memo of Law in opposition to deft Swissair's motion for summ judg.

12-2-77 Fld Answer of Deft Nigeria Airway. bf

12-16-77 Fld Deft Icelanic Airlines, Inc's answer to 1st suppl complt. sc

12-28-77 Fld Stip & Order of Discontinuance as to deft Egyptair. . . . Carter, J.

1-5-78 Fld Deft Walter Lee's ANSWER.

1-27-78 Fld Stip & Order of Discontinuance as to deft Avianca Colombian Airlines . . . Carter, J.

2-2-78 Fld Opinion #46852 . . . Accordingly, Deft's motion for summ Judg on failure to state a claim a . . . etc . . . is denied . . . Carter, J. mn

2-22-78 Fld Deft Air Canada, Air Jamaica, Air Panama et al's answer complt . . . sk

3-21-78 Fld Deft KLM's answer to 1st Amended Complt. sk

3-21-78 Fld Deft Swissair's answer to Complt. zrp

3-22-78 Fld Stip & Order of Dismissal as to Deft Dominicana Airlines w/o prej. Carter, J.

3-22-78 Fld Deft Lot Polish airlines's answer to 1st Amended Complt. sk

3-23-78 Fld Defts Air India, E. Al Israel Airlines, Ltd Iberia Airlines of Spain, Irish International Airlines, Japan Airlines, LAN-Chile Airlines, Pakistan AInternational Airlines., SAS., Sabena Belgian World Airlines, Varig Airlines., and Viasa-Venezuelan Internaional Airway (collectively, "these defts") 's ANSWER to 1st Amended complt. jrgsb

3-28-78 Fld Deft Air France's Answer. bejh

4-5-78 Fld Defts Aerolineas Argentinas et al's Motion to dismiss . . . ret 4-21-78-10AM Rm 2703

4-5-78 Fld Defts Aerolineas Argentinas et al's Memo to dismiss

4-6-78 Fld Stip & Order of Discontinuance as to Deft Iran Air with Prej . . . Carter, J.

4-6-78 Fld Stip & Order of Discontinuance as to Deft Tap-Portuguese Airway. Carter, J.

4-10-78 Fld Deft Air Afrique's Answer to Complt. bejh

4-27-78 Fld Stip & Order of Discontinuance as to deft Air Panama with prej . . . Carter, J.

4-27-78 Fld Stip & Order of Discontinuance as to deft Royal Air Maroc with/prej. Carter, J.

4-27-78 Fld Stip & Order of Discontinuance as to deft Finnair with/prej. Carter, J.

4-27-78	Fld Stip & Order of discontinuance as to deft British W.I. Airways w/prej. Carter, J.
4-27-78	Fld Stip & Order of Discontinuance as to deft Olympic Airways, S.A. w/prej. Carter, J.
5-15-78	Fld Stip & Order of Discontinuance as to Deft Ecuatoriana . . . Carter, J.
5-18-78	Fld Pltffs' memo in opposition to defts Aero Argentinas, et al's motion to dismiss the 1st amended complt.
5-25-78	Fld Pre Trial Schedule Order . . . Carter, J.
5-26-78	Fld Memo End on Motion fld 4-5-78 Motion denied for reasons stated in open Court . . . It is so Ordered . . . Carter, J mn
6-8-78	Fld Stip & Order of Discontinuance as to deft AErolineas Argentinas ONLY . . . Carter, J.
6-23-78	Fld Defts Alitalia Airlines and Lufthansa German Airlines's Answer. hr
6-27-78	Fld Notice of Reassignment to Judge Sand nm
7-13-78	Fld Pltffs. Request to enter default.
7-20-78	Fld Stip & Order as to dft. CSA Czechoslovak Airlines this action is discontinued with prejudice, etc. So Ordered Sand J.
7-20-78	Fld stip & Order of discontinuance as to dft. Lot Polish Airlines with prejudice & without costs. So Ordered Sand J.

7-20-78	Fld stip & order of discontinuance as to dft. South African Airways with prejudice & without costs, etc. So Ordered Sand J.
7-20-78	Fld stip & order of discontinuance as to dft. Air Jamaica with prejudice & without costs, etc. So Ordered Sand J.
9-26-78	Fld Notion of reassignment to Judge Lowe. (MN)
12-18-78 –	Filed Stip and order of discontinuance against deft. Air Afrique without costs to either pty. LOWE, J.
1-3-79	Filed Stip and order of discontinuance as to New York Airways, Inc. deft., with prejudice and without costs to either pltffs or deft. N.Y. Airways, Inc. LOWE, J.
1-31-79	Filed Stip and order of discontinuance as to deft. North Central Airlines, Inc. LOWE, J.
2-6-79	Filed Deft. Walter Lee's ans. and responses to pltffs' "First set of interrogs to deft. Port Authority of N.Y. and N.J. Walter Lee.
2-14-79	Filed deft. Lee's memorandum of law in response to the Ct's request for a memorandum setting forth deft. Lee's position with regard to the alleged constitutional right of pltffs to distribute liturature and solicit donations inside the various terminal bldgs of Kennedy, LaGuardia and Newark airports.

02-20-79 – Filed stip and order of dismissal as against deft VIASA-VENEZUELAN AIRLINES ONLY. and without costs to eithe pltffs or deft VIASA. So Order. LOWE, J.

02-20-79 – Filed stip and order of dismissal as against deft PAKISTAN INTERNATIONAL AIRLINES ONLY. with prejudice and without costs to either pltffs or deft PAKISTAN. So Ordered. LOWE, J.

5-23-79 Filed Stip and order of discontinuance as to deft. El Al Israel Airlines Ltd. with prejudice and without costs to either pty. LOWE, J.

7-31-79 Filed Pltffs. Affdvt. and motion for Preliminary Inj. ret. 8-17-79.

7-31-79 Filed Stip of dismissal against deft. Nigeria Ariways Ltd. with prejudice and without costs to either pltffs or deft. Nigeria Airways Ltd. LOWE, J.

11-7-79 Filed deft. Lee's Affdvt. by M. Sloane, in opposition to pltffs' motion for a preliminary Inj.

11-8-79 Filed defts. notice of motion to dismiss for lack of subject matter jurisdiction ret. 11-30-79.

3-11-81 Filed Transcript of record of proceedings, dated 1-30-81.

7-23-82 Fld Memo Opinion & Order #53452 . . . Defts motion to dismiss the amended complt for lack of jurisdiction is denied. Pltffs motion for prel inj relief is denied . . . Lowe, J. m/n

9-29-82 – Fld Air Canada Group of defts Notice of Motion to amend this Courts Memo Opinion & Order of 7-21-82 to incl a certification purs to 28 USC 1292(b) . . . etc . . . ret: 10-5-82

10-5-82 – Fld pltffs opposition to motion for certification

1-10-83 Filed Transcript of record of proceedings, dated 9-7-82

4-19-83 Fld Memo Opinion & Order #54571 . . . Deft airlines motion for an amendment of the memo opinion & order of 7-21-82 to permit an interlocutory appeal of the state action issue purs to 28 USC 1292(b) is granted . . . The Court's Memo Opinion of 7-21-82 is amended as indicated . . . Lowe, J. m/n

6-13-83 – Fld true copy of order from USCA that the motion to grant leave to file an interlocutory appeal is granted . . . Clerk, USCA m/n

4-20-84 – Fld True copy of U.S.C.A. order and opinion ordered that the appeal remanded without costs to either party to the District Court for further proceedings consistent with the opinion . . . So ordered . . . Clerk, U.S.C.A. copy sent to Lowe, J.

5-8-84 – Filed ORDER that this action is referred to Mag. Dolinger for purposes indicated. Each deft is to submit a separate Pre trial Order with Pltff . . . So Ordered, Lowe, J.

5-24-84 PRE-TRIAL CONFERENCE HELD BY Mag. Dolinger

7-6-84 – Fld Deft Lufthansa German Airlines notice of motion for a protective order purs to Hague Evidence Convention ret 8-1-84

8-1-84 – Fld Stip & order of dismissal against Deft Lan-Chile Airlines with prej, and without costs . . . So ordered . . . Lowe, J.

8-6-81 – PRE-TRIAL CONFERENCE HELD BY MAG DOLINGER

8-10-84 – Fld Order that that pltffs application to modify order of 8-7-84 is denied . . . So ordered Mag Dolinger

8-17-84 – Fld Pltffs motion for a protective order

8-27-84 – Fld Order that pltffs application is granted and reply papers shall be served and fld by 9-6-84 . . . So ordered- . . . Dolinger Mag.

8-29-84 – Fld Air Canada Group brief in opposition to pltffs motion to amend complaint

8-29-84 – Fld Air Canada Group brief in opposition to pltffs motion for protective order

9-11-84 – Fld opinion & Order 56612, that defts motion for a protective order is denied and deft shall comply with pltffs notice for production of docs within 2 weeks . . . So ordered . . . Dolinger Mag . . . csc.

9-25-84 – PRE-TRIAL CONFERENCE HELD BY MAG DOLINGER

9-26-84 – Fld order that Air India group defts may file a response before 10-2-84 . . . pltff shall serve motion for a protective order by 10-5-84 . . . defts shall serve and file a response by 010-12-84 . . . discovery is to be done by 12-31-84 . . . So ordered Dolinger Mag m.n csc

10-9-84 – Fld pltffs motion for protective order with respect to second set of interrogs

10-15-84 – Fld Defts Affidavit in opposition of pltffs motion for a protective order . . .

10-15-84 – Fld Air India Deft memo of law to pltffs for a protective order . . .

11-1-84 – Fld Air India Group of Defts affidavit of Philip Le B. Douglas in re pltffs motion for a protective order

2-28-85 – Fld Opinion #57308 ordered that pltffs motion for a protective orders relieving them of the obligation to Answer a vast body of interrogs propounded by 2 groups of defts . . . motion is granted . . . So ordered . . . Dolinger, Mag m.c

3-7-85 – Fld Magistrates Report & Recommendation that pltffs motion to serve & file complaint (amended) in form as indicated be granted except with respect to the form of identification of the Supt. of Port Authority Police . . . Dolinger, Mag m/c

3-11-85 – Fld Air Canada Notice of motion for an order rejecting decision of Mag Dolinger ret 3-27-85 . . .

3-12-85 – Fld Deft Air India Objections to Opinion and order of Mag. Dolinger Rec. Night Deposit 3-11-85

3-18-85 – Fld Defts notice of motion with supporting papers for an order rejecting certain aspects of Report & Recommendation of Mag M.H. Dolinger ret 4-4-85

3-18-85 – Fld Defts Objections to Report & Recommendation of Mag Dolinger

3-18-85 – Fld Air India Defts Objections to report & Recommendation of Mag Dolinger

4-9-85 – Fld pltffs response to defts objection to Mag Dolinger Report & Recommendation of 3-7-85

4-15-85 – Fld pltffs response to objections of Air Canada & Air India in re Mag Dolingers Opinion & order of 2-27-85.

6-4-85 – Fld order that all discovery is to be completed by 6-10-85 . . . So ordered . . . Dolinger, cmc

6-4-85 – Fld Partial Stip and order of Dismissal against Braniff Inc. . . . with prej and costs . . . So ordered . . . Lowe, J.

6-4-85 – Fld Partial Stip and order of dismissal against Air Canada . . . with prej and without costs . . . So ordered . . . Lowe, J.

6-4-85 – Fld Stip and order of Partial dismissal against Republic Airlines . . . without costs . . . So ordered . . . Lowe, J.

8-19-85 – Fld. Pltff's in opposition to Airline Defts' motion to dismiss.

8-23-85 – Fld. pltff's declaration of Brian Rumbaugh in opposition to defts' motion to dismiss and exhibits.

6-02-87 – Fld. Order on Defendant's motions to dismiss. If any party intends to file a dispositive motion other than with respect to the state action issue, it shall do so by no later than 7/31/87, if no such motion is filed, the parties shall submit a joint pre-trial order by 8/31/87 . . . So Ordered Mag. Dolinger CMC RFG

6-01-87 – Fld. Report and Recommendation to Judge Lowe, Defendants' motion to dismiss for lack of subject matter jurisdiction be denied. Pursuant to Rule 7, the parties shall have ten days from this date to file written objections to this report and Recommendation. Such objection shall be filed with the Clerk of the Court,

with extra copies delivered to the Chambers of the Honorable Mary Johnson Lowe, Room 803 and to the chambers of the undersigned, Room 503. Mag. Dolinger RFG CMC

6-10-87 – Fld. deft's obj's to Magistrates report and recommendations. GC

6-11-87 – Fld. Air India deft's statement of obj. to opinion and order of Mag. Dolinger . . . GC

6-11-87 – Fld. Air Canada's affidavit of William H. Boice . . . in support of motion . . . GC

6-11-87 – Fld. Air Canada's deft's notice of motion- . . . for an order rejecting in its entirety the report and recommendatation issued by Mag Dolinger . . . GC

6-15-87 – Fld. Air India deft's statement of obj. to opinion and order of Mag Dolinger (org. to Judge Lowe) GC

6-15-87 – Fld. deft. Lufthansa German Airlines's statement of obj. to report and recommendation to Mag Dolingers report. GC

6-17-87 – Fld deft. Lee's notice of motion . . . for a order rejecting the portions of the Report and Recommendation of Mag. Dolinger . . . ret. 6-30-87. GC

6-24-87 – Fld. pltff's repsonse to obj. to report and recommendation of Mag. Dolinger . . . GC

11-10-87 – Fld. Stip and Order . . . Sabena Belgian World Airlines is dismissed from the action as a party . . . LOWE, J. GC

11-12-87 – Fld. pltff's brief . . . in support of motion for summary judgment. GC

11-12-87 – Fld. pltff's statement of facts in support of motion . . . for summary judgment. GC

11-12-87 – Fld. pltff's notice of motion . . . for summary judgment . . . ret. 12-21-87. GC

1-19-88 – Fld. deft. Lufthensa German Airlines' brief in opposition to pltff's motion for summary judgment . . . GC

1-19-88 – Fld. defts affidavit of Anthony A. Santangelo . . . in opposition to motion for summary judgment . . . GC

1-19-88 – Fld. deft. Sup. of Pt. Authority Police's memo of law in opposition to pltff's motion for summary judgment . . . GC

1-19-88 – Fld. deft's affidavit of Morris Sloane . . . in opposition to pltff's moiton for summary judgment . . . GC

1-19-88 – Fld. certain deft's affidavit of William H. Boice . . . in support of memo of law in opposition to motion for summary judgment . . . GC

1-20-88 – Fld. Air India deft's statement purs. to rule 3(g) GC

1-20-88 – Fld. deft. Air India affidavit of Leif Andersson . . . in opposition to pltff's motion for summary judgment . . . GC

1-20-88 – Fld. Air India deft's memo of law at opposition to pltff's motion for summary judgment . . . GC

3-16-88 – Fld. pltff's reply to oppostion of Superintendnt of Port Authority Police to motion for summary judgment . . . GC

3-31-88 – Files Transcript of record of proceedings, dated 3-25-88

4-22-88 – Fld. deft's supplemental memo of law in opposition to pltff's motion for summary judgment . . . GC

4-22-88 – Fld. deft's supplemental affidvit of Morris Sloane . . . in opposition to pltff's motion for summary judgment . . . GC

4-22-88 – Fld. deft's supplemental affidavit of Frederick V. Hurst Jr. in opposition to pltff's motion for summary judgment . . . GC

5-10-88 – Fld. Stip and Order of Settlement agreement and release . . . Airline deft's will pay to pltff's the total sum of $165,000.00 within 30 days of the date . . . with prejudice with each party to bear its own costs . . . LOWE, J. cm GC

10-25-88 – Fld. REPORT AND RECOMMENDATION . . . pltff's motion for summary judgment be granted . . . the parties shall have 10 days from teh date to file written objections to the Report and Recommendation . . . such objections ahll be filed withe the clerk of the Court. with extra copies delivered to the chambers of Mary Johnson
Lowe . . . MAG. DOLINGER cmc 10-25-88 GC

12-14-88 – Fld. deft's memo of law . . . in support of deft's objections to Magistate's report and recommendation. GC

12-14-88 – Fld. deft's objections to Magistrate's report and recommendatoin. GC

12-14-88 – Fld. deft's reply affidavit of Morris Sloane . . . in opposition to pltff's motion for summary judgment and for a permanent inj. GC

12-30-88 – Fld. plff's response to Port Authority's objection to report and recommendation of Mag. Dolinger granting pltff's motion for summary judgment. GC

12-30-88 – Fld. pltff's declaration of David M. Liberman . . . in support of pltff's reponse to Port Authority's objection to the report and recommendation of Mag. Dolinger GC

9-18-89 – Fld. OPINION AND ORDER #64894 . . . Plaintiffs Motion for summary judgment is granted . . . LOWE J, cm DO.

10-19-89 – Fld. JUDGMENT, . . . that defts and each of them, and their agents, srevants, attnys and employees are permanently enjoined from enforcing or attempting to enforce, . . . LOWE, J. eod: 10-23-89 NW

10-23-89 – Fld. Stip & Order, . . . that the time for either party to make an app. for attnys fees . . . shall be extended until a reasonable time and in no event less than sixty days after all appeals or other review in this action have become final . . . LOWE, J. NW

11-8-89 – Fld. DEFT NOTICE OF APPEAL to the U.S.C.A. for the second circuit, from the final judgment on 10-23-89.

11-24-89 – Fowarded copy of notice of appeal and docket sheet entries to court of appeals and copy of notice of appeals to the district court judge. NW

1-11-90 – Fld. Stip & Order of Record on Appeal, . . . LOWE, J. NW

1-17-90 – Fld. Notice that the record on appeal in the action has been transmitted to the U.S.C.A. for the second circuit on 1-17-90. NW

5-10-91 – Fld True Copy of U.S.C.A. MANDATE: It is Ordered, adjudged & decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part in accordance with the opinion of this court. ELAINE B. GOLDSMITH, CLERK. EOD: 5-21-91. GQ

BARRY A. FISHER, a member of
Fleishman, McDaniel, Brown & Weston
6922 Hollywood Boulevard, Suite 718
Hollywood, California 90028
(213) 466-6171
and
LEONARD KAUFMAN, a member of
Kommel, Rogers, Kaufman, Lorber & Shenkman
380 Madison Avenue
New York, New York 10017
(212) 986-9779

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members, Plaintiffs, v. NEW YORK PORT AUTHORITY and EASTERN AIRLINES and WALTER LEE, Chief of Port Authority Police, individually and in official capacity, Defendants.	NO. 75CIV538RLC COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I

INTRODUCTION

1. This is a Civil Rights suit for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02, brought by the Hare Krishna Society to enjoin enforcement of three New York Port Authority licensing regulations which are standardless and unconstitutional both on their face and as construed and applied to the distribution of religious literature and solicitation of donations in those portions of Kennedy, LaGuardia and Newark International Airports open to the general public. The regulations at issue are defective because they vest discretion in officials to grant or deny licenses for the exercise of First Amendment rights, without definitive, narrow, and objective standards to govern such discretion. Plaintiffs seek temporary injunctive relief so that they may proceed with their proselytizing which is the very mainstay and lifeblood of their religious movement.

II

JURISDICTION

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331 (Federal Question) and 1343 (3-4) (Civil Rights). The matter in controversy exceeds $10,000.00, exclusive of interest and costs.

III

PARTIES

Plaintiffs

3. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. (hereinafter "ISKCON" or "Hare Krishna Society") is an international religious society which espouses the religious and missionary views of Krishna Consciousness. It is duly organized as a non-profit religious corporation under the laws of the State of New York and maintains temples and schools in cities throughout the United States and world, including New York, New York.

4. JOHN WINSLOW is the President of the New York Temple of ISKCON. He has been a devotee of the religion for four years and was ordained as a priest in 1972. His spiritual name, the name he is commonly known as, is GOPIJANAVALLAVA DAS BRAHMACARY. JOHN WINSLOW performs religious missionary work in public places and wishes to continue doing so, including in the public portions of Port Authority's Airports.

Defendants

5. NEW YORK PORT AUTHORITY is a public corporation with principal offices in the Southern District of New York, created in 1921 by agreement between the States of New York and New Jersey. McKinney's Consolidated Laws of New York, §§ 6401, 6404. The NEW YORK PORT AUTHORITY operates Newark, Kennedy, and LaGuardia Airports and maintains its own police force

which is charged with law enforcement. The Port Authority police are expressly provided with the powers of "peace officers". New York Code of Criminal Procedure, § 154. As such, they are charged with the implementation and enforcement of the regulations at issue in this complaint, including the arrest of those in violation. Walter Lee is Chief of Police.

6. EASTERN AIRLINES is a Delaware corporation with executive offices in the Southern District of new York. EASTERN AIRLINES is a Port Authority lessee at Kennedy, LaGuardia and Newark Airports.

7. The acts and practices of the Defendants herein and their agents, as herein alleged, were performed under code or law, and, therefore constitute actions of the State within the meaning of the Fourteenth Amendment to the United States Constitution.

IV

FACTS

8. The Hare Krishna Society imposes on its members the duty to perform a religious ritual known as Sankirtan, which consists of soliciting and accepting donations and contributions while disseminating religious literature and information in public places. Sankirtan is directed to spreading religious truth as it is known to the Kare [sic] Krishna Society, attracting new members, and supporting the Society's religious activities. Donations and book sales are the very lifeblood and principal means of support of this religious movement. The

devotees often wear distinctive and unconventional garments, hair styles, and spiritual body markings.

9. ISKCON devotees have recently attempted to perform Sankirtan in those portions of Kennedy, LaGuardia, and Newark International Airports open to the general public. Plaintiffs seek only to distribute literature and solicit donations in terminals; they do not seek to dance, chant, or to engage in any similar conduct.

10. The Kennedy, LaGuardia, and Newark Airport terminals are operated and policed by the New York Port Authority and are thoroughfares for millions of people yearly, including millions who are not passengers.

11. The NEW YORK PORT AUTHORITY has promulgated regulations respecting the distribution of literature and solicitation of donations at Kennedy, LaGuardia and Newark Airports. New York Code of Rules and Regulations, Title 21, Chapter 24.

12. Section 1260.13 of the Port Authority Regulations provides that "No person shall post, distribute or display signs, advertisements, circulars, printed or written matter at an air terminal without permission." Section 1260.14 states that "No person shall solicit funds for any purpose at an air terminal without permission." Section 1260.15 provides that "No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal: (a) sell, or offer for sale any article or merchandise; (d) [sic] solicit alms."

13. Section 1260.1(h) provides that "Permission shall mean permission granted by the manager, unless

otherwise specifically provided." Section 1260.1(e) states that "Manager shall mean the Port Authority manager or other Port Authority official in charge of an air terminal, or his duly authorized representative." No standards whatsoever are included to guide the discretion of the manager or his delegate.

14. The NEW YORK PORT AUTHORITY recognizes that Plaintiffs may distribute literature and solicit donations in the public portions of the Kennedy, LaGuardia and Newark terminals. However, the Port Authority's position is that it loses its jurisdiction once it leases lobbies and other public portions of the terminals to tenants such as EASTERN AIRLINES. The power to grant or deny permission to engage in First Amendment conduct as provided in the above-referred to regulations is considered by the Port Authority to be delegated to its lessees such as EASTERN AIRLINES.

15. Accordingly, the Port Authority has refused to give Plaintiffs permission to practice Sankirtan in public portions of the airports such as lobbies which are leased to EASTERN AIRLINES and other carriers.

16. EASTERN AIRLINES has informed Plaintiffs that, while Plaintiffs might distribute literature, they are prohibited from soliciting donations in those portions of the terminal open to the general public but leased to EASTERN AIRLINES.

17. Plaintiffs have been informed by Port Authority police that, without EASTERN AIRLINES' permission, they are subject to arrest at the Eastern terminals for trespass. No prosecutions are presently pending against

Plaintiffs respecting the regulations at issue in this case or for trespass.

18. EASTERN AIRLINES' position respecting Kennedy, LaGuardia and Newark Airports differs from its position at the Boston International Airport where the same Port Authority-Lessee relationship pertains. The Massachusetts Port Authority recently recognized Plaintiffs' right to distribute literature and solicit donations in terminals, but deferred to EASTERN AIRLINES as to whether it would be allowed in the EASTERN AIRLINES terminal. The EASTERN AIRLINES manager at Boston International Airport readily agreed to Plaintiffs' Sankirtan, including solicitation of donations, to an extent equal to that acknowledged by the Massachusetts Port Authority.

19. The regulations at issue, on their face and as construed and applied to prohibit the distribution and sale of religious literature by members of a religious organization, without a permit for which no narrow or definite standards are specified, substantively and procedurally abridges the exercise of freedoms of speech and press, arbitrarily deprives persons of their liberty and property without due process of law, capriciously denies the equal protection of the laws, and is vague, ambiguous and overbroad, all in violation of the First and Fourteenth Amendments to the United States Constitution.

V

EQUITY AND IRREPARABLE INJURY

20. There is between the parties an actual controversy as hereinbefore set forth herein. The Plaintiffs are suffering irreparable injury and are threatened with irreparable harm in the future by reason of the acts herein complained of and a substantial loss or impairment of freedom of expression has occurred and will continue to occur so long as Defendants' conduct continues. Plaintiffs will be harassed and intimidated by Defendants and their agents utilizing the ordinances at issue so long as they continue to proselytize at the Kennedy, LaGuardia and Newark Airports. Furthermore, the chilling effect upon the exercise of First Amendment rights may derive from the fact of threats of prosecution unaffected by prospects of its success or failure.

21. Plaintiffs have no plain, adequate or complete remedy to speedily redress the wrongs herein complained of other than this action. Any other remedy to which Plaintiffs could be remitted would be attended by such uncertainties and delays as to deny substantial relief, involve a multiplicity of suits, and cause further irreparable injury, damage and inconvenience to the Plaintiffs and to those similarly situated. The award of damages to Plaintiffs is not adequate to protect them from the continuing police conduct and the chilling effect it has upon the exercise of Plaintiffs' constitutional rights.

VI

RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that the New York – New Jersey Air Terminals Regulations [New York State Code of Rules and Regulations, Title 21, Chapter 24, Sections 1260.13-1260.15], on their face and as construed and applied to prohibit the distribution or sale of Plaintiffs' religious literature by members of a religious organization, abridges the free exercise of religion and the freedoms of speech and press, contrary to the First and Fourteenth Amendments to the United States Constitution;

2. Temporarily and permanently enjoin the Defendants from arresting or participating in the arrest of Plaintiffs or their membership for violation of the New York – New Jersey Air Terminals Regulations [New York State Code of Rules and Regulations, Title 21, Chapter 24, Section 1260.13-1260.15], and from any way interfering directly or indirectly with Plaintiffs' right to be in the public portions of the Kennedy, LaGuardia or Newark Airports, including arresting or participating in Plaintiffs' arrest for trespass, where Plaintiffs or their membership are engaged in the peaceable dissemination of literature or solicitation of donations or sales in any portions inside or outside of the terminals generally open to the public; and

3. Grant Plaintiffs' attorney's fees, costs and such other and further relief as may be equitable and just.

DATED: October 29, 1975.

FLEISHMAN, McDANIEL,
BROWN & WESTON
and
KOMMEL, ROGERS, KAUFMAN,
LORBER & SHENKMAN

By /s/ Barry A. Fisher
BARRY A. FISHER

By /s/ Jon M. Kaufman
JON KAUFMAN
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH on behalf of themselves and all International Society for Krishna Consciousness, Inc. members,

Plaintiffs,

-against-

WALTER LEE, Superintendent of the Port Authority Police, individually and in his official capacity, AEROFLOT SOVIET AIRLINES, AEROLINEAS ARGENTINAS, AEROMEXICO, S.A., AIR AFRIQUE, AIR CANADA, AIR FRANCE, AIR INDIA, AIR JAMAICA, AIR PANAMA, ALITALIA, AVIANCA COLUMBIAN AIRLINES, BRITISH AIRWAYS, BRITISH WEST INDIAN AIRWAYS, CSA CZECHOSLOVAK AIRLINES, DOMINICAN DE AVIACION, ECUATORIANA, EGYPTAIR, EL AL ISRAEL AIRLINES, LTD., FINNAIR, IBERIA AIRLINES OF SPAIN, ICELANDIC AIRLINES, INC., IRAN AIR, IRISH INTERNATIONAL AIRLINES, JAPAN AIR LINES, JAT-YUGOSLAV AIRLINES, KLM ROYAL DUTCH AIRLINES, LAN-CHILE AIRLINES, LOT POLISH

Index No.
75 Civ. 5388
(RLC)

FIRST AMENDED COMPLAINT

(Filed
Oct. 17, 1977)

AIRLINES, LUFTHANSA GERMAN AIRLINES, NIGERIA AIRWAYS, OLYMPIC AIRWAYS, PAKISTAN INTERNATIONAL AIRLINES, ROYAL AIR MAROC, SABENA-BELGIAN WORLD AIRLINES, SAS-SCANDINAVIAN AIRLINES, SOUTH AFRICAN AIRWAYS, SWISSAIR, TAP-PORTUGUESE AIRWAYS, TAROM ROMANIAN AIRLINES, VARIG AIRLINES, VIASA-VENEZUELA INTERNATIONAL AIRWAYS, AIR NEW ENGLAND, ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC. BRANIFF INTERNATIONAL AIRWAYS, DELTA AIR LINES, INC., EASTERN AIR LINES, INC., NEW YORK AIRWAYS, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, INC., OZARK AIRLINES, PAN AMERICAN WORLD AIRWAYS, PIEDMONT AIRLINES, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, and UNITED AIRLINES, INC.,

Defendants.

----------x

PLAINTIFFS, by their undersigned attorneys, individually and on behalf of all members of the International Society for Krishna Consciousness, Inc. complaining of the defendants, respectfully show to the Court and allege as follows in this, their First Supplemental Complaint herein.

I. JURISDICTION

FIRST: This is a Civil Rights action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. Plaintiffs seek to redress the deprivation under color of state law by the defendants of rights secured to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution; and seek to have declared unconstitutional defendants' official policy, as hereinafter set forth more particularly, which results in the deprivation of plaintiffs' rights to speak and freely to exercise their religion. Plaintiffs seek to enjoin defendants permanently from enforcing said policies against plaintiffs.

SECOND: Jurisdiction of this Court is invoked under 28 U.S.C. §§1331 and 1343(3) and (4). There exists between the parties an actual controversy, justiciable in character, involving in excess of $10,000.00, exclusive of interest and costs.

II. PARTIES

THIRD: Plaintiff International Society for Krishna Consciousness, Inc., (hereinafter "ISKCON" or "Hare Krishna Society") is an international religious society which espouses the religious and missionary views of Krishna Consciousness. It is duly organized as a non-profit religious corporation under the laws of the State of New York and maintains temples and schools in cities throughout the United States, including New York, New York.

FOURTH: Plaintiff Brian Rumbaugh is the acting President of the New York Temple of ISKCON. He has been a devotee of the religion for seven years and was ordained as a priest in 1971. His spiritual name, the name by which he is commonly known, is Romapada das. Brian Rumbaugh performs religious missionary work in public places and wishes to continue doing so, including in John F. Kennedy, LaGuardia and Newark Airports.

FIFTH: Defendant Walter Lee is Superintendent of the police employed by the Port Authority of New York and New Jersey ("Port Authority") which is an entity created by compact between the states of New York and New Jersey in 1921. See McKinney's Unconsolidated Laws §6401 through 6404. Port Authority owns and operates John F. Kennedy and LaGuardia Airports in New York and Newark Airport in New Jersey. Defendant Lee is sued individually and in his official capacity as the Superintendent of the Port Authority Police. As such defendant Lee is charged with the principle duty of enforcing the applicable New York and New Jersey criminal laws and the regulations of the Port Authority at the Kennedy, LaGuardia and Newark Airports.

SIXTH: Defendants Aeroflot Soviet Airlines, Aerolineas Argentinas, Aeromexico, S.A., Air Afrique, Air Canada. Air France, Air India, Air Jamaica, Air Panama, Alitalia, Avianca Colombian Airlines, British Airways, British West Indian Airways, CSA Czechoslovak Airlines, Dominican De Aviacion, Ecuatoriana, Egyptair, El Al Israel Airlines, Ltd., Finnair, Iberia Airlines of Spain, Icelandic Airlines, Inc., Iran Air, Irish International Airlines, Japan Air Lines, JAT-Yugoslav Airlines, KLM

Royal Dutch Airlines, Lan-Chile Airlines, Lot Polish Airlines, Lufthansa German Airlines, Nigeria Airways, Olympic Airways, Pakistan International Airlines, Royal Air Maroc, SABENA-Belgian World Airlines, SAS-Scandinavian Airlines, South African Airways, Swissair, TAP-Portuguese Airways, TAROM Romanian Airlines, VARIG Airlines and VIASA-Venezuela International Airways are lessees or licensees of terminal space from the Port of Authority at Kennedy Airport. Each of the aforesaid airlines (hereinafter collectively referred to as Foreign-Flag Carriers) maintains executive, sales or ticket offices within the Southern District of New York.

SEVENTH: Defendants Air New England, Allegheny Airlines, Inc., American Airlines, Inc., Braniff International Airways, Delta Airlines, Inc., Eastern Air Lines, Inc., New York Airways, Inc., North Central Airlines, Northwest Airlines, Inc., Ozark Airlines, Pan American World Airways, Piedmont Airlines, Southern Airways, Trans World Airlines and United Airlines, Inc. (hereinafter collectively referred to as Domestic Flag-Carriers) are lessees or licensees of the Port of Authority at Kennedy, LaGuardia and Newark Airports. Upon information and belief, each of the Domestic Flag Carriers maintains executive, sales or ticket offices within the Southern District of New York.

III. FACTS

EIGHTH: The Hare Krishna Society imposes on its members the duty to perform a religious ritual known as Sankirtan, which consists of soliciting and accepting

donations and contributions while disseminating religious literature and information in public places. Sankirtan is directed to spreading religious truth as it is known to the Hare Krishna Society, attracting new members, and supporting the Society's religious activities. Donations and book distribution are the very lifeblood and principal means of support of this religious movement. The devotees often wear distinctive and unconventional garments, hair styles, and spiritual body markings.

NINTH: ISKCON devotees have recently attempted to perform Sankirtan in those portions of Kennedy, LaGuardia and Newark International Airports open to the general public. Plaintiffs seek only to distribute literature and solicit donations in terminals; they do not seek to dance, chant, or to engage in any similar conduct.

TENTH: The Kennedy, LaGuardia and Newark Airport terminals are operated and policed by defendant Lee and the Port Authority and are thoroughfares for millions of people yearly including millions who are not passengers. Space is leased and licensed not only to airlines but to other transportation facilities, food concessions, shops, newsstands and other businesses not directly connected to air transportation.

ELEVENTH: The Port Authority has promulgated regulations, which defendant Lee is charged with enforcing, respecting the distribution of literature and solicitation of donations at the three airports. New York Code of Rules and Regulations, Title 21, Chapter 24.

TWELFTH: Section 1260.13 of the Port Authority Regulations provides that "No person shall post, distribute or display signs, advertisements, circulars, printed or

written matter at an air terminal without permission." Section 1260.14 states that "No person shall solicit funds for any purpose at an air terminal without permission". Section 1260.15 provides that "No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal: (a) sell, or offer for sale any article or merchandise; (d) solicit alms."

THIRTEENTH: Section 1260.1(h) provides that "Permission shall mean permission granted by the manager, unless otherwise specifically provided." Section 1260.1(e) states that "Manager shall mean the Port Authority manager or other Port Authority official in charge of an air terminal, or his duly authorized representative." No standards whatsoever are included to guide the discretion of the manager or his delegate, assuming delegation to be permissible.

FOURTEENTH: The Port Authority, through its agents, including defendant Lee, has given to plaintiffs permission to distribute literature and solicit contributions only within certain limited public portions of certain of the terminals at Kennedy and LaGuardia Airports. Port Authority and defendant Lee have advised plaintiffs that no literature distribution or fund solicitation at all will be tolerated at Newark Airport and that permission to perform Sankirtan at Newark Airport is subject entirely to whatever terms and conditions may from time to time be imposed and amended by those defendant Domestic Flag Carriers respectively who lease or are licensed to use space from the Port Authority at Newark Airport.

FIFTEENTH: The Port Authority, through Defendant Lee, has refused to grant to plaintiffs permission at any of the three airports, to perform Sankirtan in any area which Port Authority has leased or licensed to any of the defendant Foreign or Domestic Flag Carriers. Plaintiffs have been told by Port Authority and defendant Lee that they are prohibited from doing so and will be arrested and prosecuted if they try to do so. Defendant Lee has the duty and authority to enforce the above regulations and all other provisions of law in areas leased and licensed to defendant Carriers and others.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT EASTERN AIRLINES, INC.

SIXTEENTH: At Kennedy and LaGuardia Airports, the Port Authority has granted easements and other rights to the defendant airlines, concessionaires and others. The discretion vested in Port Authority officials to license the exercise of First Amendment rights pursuant to §§ 1260.13 - .15 has not been and cannot be lawfully delegated or sub-delegated by Port Authority to any of the airline defendants or others. Even if delegated, Port Authority has promulgated no standards whatsoever to guide the discretion of the lessees and other in exercising their discretion respecting the grant of First Amendment rights. If delegated, even with standards, the power to license First Amendment rights cannot be delegated by Port Authority to private parties, particularly such private parties as the airline defendants who have vested economic interest in minimizing the presence of unpopular groups, including plaintiffs, soliciting from the licensees' customers.

SEVENTEENTH: Plaintiffs have been informed by Port Authority police under the jurisdiction of defendant Lee that plaintiffs are subject to immediate arrest in the terminals on criminal charges, including trespass, if they attempt to distribute literature in any place other than as set forth in paragraph Fourteenth above, unless plaintiffs have permission granted by the respective airline lessees and licensees.

EIGHTEENTH: The spaces in the various terminals leased or licensed to the airline defendants include areas which are appropriate locations for the exercise of First Amendment rights. They are functionally public thoroughfares and any restrictions on First Amendment activities must be carefully promulgated to protect the public order and the free flow of traffic while permitting as wide an exercise of First Amendment rights as possible.

NINETEENTH: The regulations at issue, on their face and as construed and applied to prohibit the distribution and sale of religious literature by members of a religious organization, without a permit for which no narrow or definite standards are specified, substantively and procedurally abridge the exercise of freedoms of speech, press and religion, arbitrarily deprive persons of their liberty and property without due process of law, capriciously deny the equal protection of the laws, and are vague, ambiguous and over-broad, all in violation of the First and Fourteenth Amendments to the United States Constitution.

TWENTIETH: There is between the parties an actual controversy as hereinabove set forth herein. The

plaintiffs are suffering irreparable injury and are threatened with irreparable harm in the future by reason of the acts herein complained of and a substantial loss or impairment of freedom of expression has occurred and will continue to occur so long as defendants' conduct continues. Plaintiffs have been, are being and will continue to be harassed and intimidated by defendants and their agents utilizing the ordinances at issue so long as plaintiffs continue to proselytize at Kennedy and LaGuardia Airports. Furthermore, there is in fact a chilling effect upon the exercise of First Amendment rights derived from the fact of threats of prosecution unaffected by prospects of its success or failure.

TWENTY-FIRST: Plaintiffs have no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT LEE AND DEFENDANTS ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL AIRWAYS, DELTA AIR LINES, INC., EASTERN AIR LINES, INC., NEW YORK AIR WAYS, INC., NORTHWEST AIRLINES, INC., PIEDMONT AIRLINES, TRANS WORLD AIRLINES, AND UNITED AIRLINES, INC.

TWENTY-SECOND: Plaintiff repeats and realleges each and every allegation of paragraphs First through Eighteenth as if fully and completely set forth herein.

TWENTY-THIRD: The Port Authority, at Newark Airport, has leased or licensed easements and other rights to the Airlines named in the caption of this second cause of action, to concessionaires, and to others. The discretion vested in Port Authority officials to license the

exercise of First Amendment rights pursuant to §§ 1260.13 - .15 has not been and cannot lawfully be delegated or sub-delegated to the above airline defendants. Even if delegated, Port Authority has promulgated no standards whatsoever to guide the discretion of the lessees or licensees in exercising discretion respecting the grant of First Amendment rights. If delegated, even with standards, the power to license First Amendment rights cannot lawfully be delegated by Port Authority to private parties, particularly such as the airline defendants who have a vested economic interests in minimizing the presence of unpopular groups, including plaintiffs, soliciting from the licensees' customers.

TWENTY-FOURTH: Plaintiffs have been informed by the Port Authority Police under the jurisdiction of defendant Lee that plaintiffs will be subject to immediate arrest on criminal charges, including trespass, if they attempt to distribute literature or solicit contributions anywhere in Newark Airport without the permission of the respective airline lessees.

TWENTY-FIFTH: The spaces in the various terminals leased to the airline defendants at Newark Airport include areas which are appropriate locations for the exercise of First Amendment rights. They are functionally public thoroughfares and any restrictions on First Amendment activities must be carefully promulgated to protect the public order and the free flow of traffic while permitting as wide an exercise of First Amendment rights as possible.

TWENTY-SIXTH: The regulations at issue, on their face and as construed and applied to prohibit the distribution and sale of religious literature by members of a religious organization, without a permit for which no narrow or definite standards are specified, substantively and procedurally abridge the exercise of freedoms of speech, press and religion, arbitrarily deprive persons of their liberty and property without due process of law, capriciously deny the equal protection of the laws, and are vague, ambiguous and over-broad, all in violation of the First and Fourteenth Amendments to the United States Constitution.

TWENTY-SEVENTH: There is between the parties an actual controversy as hereinbefore set forth herein. The plaintiffs are suffering irreparable injury and are threatened with irreparable harm in the future by reason of the acts herein complained of and a substantial loss or impairment of freedom of expression has occurred and will continue to occur so long as defendants' conduct continues. Plaintiffs have been and will continue to be harassed and intimidated by defendants and their agents utilizing the ordinances at issue so long as plaintiffs continue to proselytize at Newark Airport. Furthermore, there is in fact a chilling effect upon the exercise of First Amendment rights derived from the fact of threats of prosecution unaffected by prospects of its success or failure.

TWENTY-EIGHTH: Plaintiffs have no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS LEE AND EASTERN AIRLINES.

TWENTY-NINTH: Plaintiffs repeat and reallege each and every allegation of paragraphs First through Eighteenth as if fully and completely set forth herein.

THIRTIETH: Defendant Eastern Airlines has purported to promulgate certain regulations for Kennedy and LaGuardia Airports pursuant to authority allegedly delegated to it by the Port Authority. (A copy of said regulations is annexed hereto as Exhibit A).

THIRTY-FIRST: Port Authority has no right, privilege or power to delegate to defendant Eastern Airlines the authority to promulgate such regulations and in fact has not done so. If Port Authority claims to have done so, it has failed to establish any standards to guide the alleged discretion of defendant Eastern Airlines in exercising asserted power to restrict First Amendment rights. If delegated, even with standards, the power to license First Amendment rights cannot lawfully be delegated to a private party particularly one such as defendant Eastern Airlines which has a vested economic interest in minimizing the presence of unpopular groups, including plaintiffs, soliciting from defendant Eastern Airline's customers.

THIRTY-SECOND: The regulations promulgated by defendant Eastern for Kennedy and LaGuardia Airports and enforced by defendant Lee violate the First and Fourteenth Amendments to the Constitution of the United States in that the regulations:

a) Restrict the free exercise of religion of the plaintiffs by prohibiting the solicitation of donations in connection with the distribution of literature;

b) Are overly restrictive as to the locations within space leased or licensed to Eastern where distribution of literature is permitted;

c) Are overly restrictive as to the distances from ticket lines and counters, security check points, outer doors, stairwells and escalators where plaintiffs are allowed to distribute literature;

d) Are overly restrictive as to the number of days during which the distribution of literature is altogether prohibited;

e) Are overly restrictive in that suspension of a permit "in the event of emergencies" is permitted without any standard to define emergencies;

f) Are overly restrictive in that they prohibit entirely the distribution of literature at the Air-Shuttle terminals leased by or licensed to Eastern Air Lines at the airports;

g) Are overly restrictive in that they allow the distribution of literature pursuant to a permit for a period of only seven days, thereby requiring plaintiffs to make repeated applications for renewal of the permit;

h) Are overly restrictive in that they unreasonably limit the number of devotees who may perform Sankirtan;

i) Are unrelated by reason or need to the simple functioning of the Eastern facilities at Kennedy and LaGuardia airports;

j) Are designed to and do have the effect of prohibiting the free exercise of religion and of abridging plaintiffs' freedom of speech, press activities and right of peaceable assembly.

THIRTY-THIRD: As a direct result of the regulations promulgated by defendant Eastern, plaintiffs have suffered, are suffering, and will continue to suffer irreparable injury by reason of the acts herein complained of in that their rights to press, speech and assembly freedoms and freely to exercise their religion have been substantially impaired.

THIRTY-FOURTH: Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court;

A. Declare that the New York Port Authority Regulations (N.Y.C.R.R. Title 21, Chapter 24 §§ 1260.13 to 1260.15) on their face and as construed and applied to prohibit the distribution or sale of plaintiffs' religious literature by members of a religious organization, abridge the free exercise of religion, and the freedom of speech and the press, all in contravention of the First and Fourteenth Amendments to the Constitution of the United States;

B. Temporarily and permanently enjoin defendants and their respective agents, servants and employees from (1) arresting or participating in the arrest of, or taking any action whatsoever against plaintiffs or plaintiffs'

members, for any alleged violation of the Port Authority Regulations (N.Y.C.R.R., Title 21, Chapter 24 §§ 1260.13 to 1260.15) and from (2) interfering directly or indirectly with plaintiffs' rights to be in the public portions of the Kennedy, LaGuardia or Newark Airports and from (3) participating in plaintiffs' arrest for trespass or any other charge where plaintiffs or their members are engaged in the peaceable dissemination or sale of literature or materials or seeking donations in any portion inside or outside of the terminals generally open to the public;

C. Declare that the regulations promulgated by Eastern Airlines with respect to First Amendment activities at Kennedy and LaGuardia airport facilities leased or licensed to defendant Eastern are over-broad and unrelated to the functioning of Eastern's facilities, all in violation of the First and Fourteenth Amendments to the United States Constitution;

D. Temporarily and permanently enjoining defendants and their respective agents, servants and employees from enforcing or attempting to enforce the Eastern Airline's purported regulations with respect to Eastern Airlines space at Kennedy and LaGuardia Airports or either of them; and

E. Award plaintiffs their attorneys fees pursuant to 42 U.S.C. § 1988; and

F. Grant to plaintiffs such other, further and different relief as may be just.

Dated: New York, New York
July 28, 1977.

/s/ Eugene N. Harley
JEREMIAH S. GUTMAN, ESQ.
EUGENE N. HARLEY, ESQ.
LEVY, GUTMAN, GOLDBERG
AND KAPLAN
Attorneys for Plaintiffs
363 Seventh Avenue
New York, New York 10001
(212) 736 2226

BARRY FISHER, ESQ.
Attorney for Plaintiffs
433 North Camden Drive, Suite
900
Beverly Hills, California 90210
(213) 550 7460

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

BRIAN RUMBAUGH, being duly sworn, deposes and says that deponent is one of the plaintiffs in the within action; that deponent has read the foregoing First Supplemental Complaint and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

/s/ Brian Rumbaugh
BRIAN RUMBAUGH

Sworn to before me, this 28th
day of July, 1977.

/s/ Eugene N. Harley
EUGENE N. HARLEY
Notary Public, State of New York
No. 31-6772225
Qualified in New York County
Commission Expires March 30, 1978

Rules for Distributing of Written, Printed or Pictorial Religious Material at Eastern Air Lines, Inc.'s Passenger Terminals at John F. Kennedy International Airport and La Guardia Airport

No person or group may distribute any sign, advertisement, circular or other written, printed, or pictorial religious material at Eastern Air Lines, Inc.'s (Eastern) passenger terminals at John F. Kennedy International Airport or La Guardia Airport except pursuant to these passenger terminal rules and regulations.

1. Distribution shall be made only at locations specified in these rules and/or in any permit issued by Eastern.

2. Distribution shall not be made in any air operations area, any hanger or office area, or any departure gate area or any curbside check-in area, or any other area designated as a security area under Eastern's security plan filed with the Federal Aviation Administration pursuant to Section 121 of the Federal Aviation Regulations, any baggage claim area, any area restricted to Eastern's

own employees and/or passengers ticketed on Eastern or any other air carrier using Eastern's facilities or any other area not otherwise open to the general public.

3. Distribution shall not be made within approximately twenty-five (25) feet of any ticket counter, check-in counter, or information counter nor to any persons waiting on line at or about any ticket counter, check-in counter or information counter, except as otherwise provided herein.

4. Any person or group distributing material in a passenger terminal may not engage in any mass demonstrations or similar such group activities and may not use any loudspeakers or similar such devices at any time and further may not play any musical instruments or other devices in the passenger terminal.

5. Distribution shall not be made within approximately twenty-five (25) feet of any security check point and/or security device located within a passenger terminal nor to any persons waiting on line at or about any security check point and/or security device, except as otherwise provided herein.

6. Distribution shall not be made within approximately twenty-five (25) feet of any outer doors of general circulation providing means of ingress or egress to a passenger terminal, except as otherwise provided herein.

7. Distribution shall not be made within approximately twenty-five (25) feet of any stairwell, escalator or elevator in a passenger terminal, except as otherwise provided herein.

8. Distribution shall not be made in any area of Eastern's passenger terminals subleased or allocated to a tenant or concessionaire without the express permission of such tenant, concessionaire or other appropriate entity.

9. Distribution shall not be made in any way that would interfere with the safe operation of Eastern's passenger terminals or that would unreasonably interfere with passenger traffic or harass, block the movement of or interfere with the rights of other persons or otherwise unreasonably interfere with any of the operations of the passenger terminal.

10. Distribution shall not be made in any way so as to disturb the peace, or to incite lawless acts by other persons at the passenger terminal.

11. Distribution will be made in a polite and courteous fashion and material will be distributed only to those persons willing to accept it. Members of the public will not be harassed or otherwise unreasonably interfered with in any way.

12. No sign, advertisement, circular or other written, printed or pictorial matter will be affixed to the passenger terminal and no such material shall be distributed by leaving it unattended throughout the passenger terminal. No such material will be left unattended in any area of the passenger terminal for an unreasonable length of time.

13. The total number of persons distributing material for any group or groups within a passenger terminal shall not exceed the total numbers set forth below for each passenger terminal.

14. No more than one group will be permitted to distribute material in any passenger terminal at any one time. However, the Eastern Station Manager (as used herein, "Eastern Station Manager" means the Station Manager and/or his/her designee) may in his discretion permit more than one group to distribute material provided however that the total number of persons for all groups distributing material in a passenger terminal shall not exceed the total number set forth below at each passenger terminal.

15. Any group distributing material at a passenger terminal shall identify by name, address and telephone number the organization or person sponsoring the distribution of the written, printed or pictorial matter and the persons who will be distributing such material at the passenger terminal. The group will also provide Eastern with the name, address and telephone number of a person or persons to act as a liaison between the group and Eastern.

16. No distribution of any material will be permitted during the peak traffic periods set forth below. The eastern Station Manager may in his discretion permit distribution during these periods if in his reasonable opinion such distribution would not interfere with the safe and efficient operation of the passenger terminal. If distribution is permitted during these peak traffic periods, the Station Manager may limit the total number of persons distributing material and their locations in the passenger terminal in accordance with operational needs.

17. Any group distributing material at a passenger terminal shall take appropriate measures to ensure that

the distributed matter does not litter the passenger terminal.

18. The Eastern Station Manager may suspend at any time a permit issued pursuant to these rules in the event of emergencies such as but not limited to extended passenger delays caused by adverse weather or operating conditions.

19. No person or group may distribute any sign, advertisement, circular or other written, printed or pictorial religious matter at Eastern's passenger terminals at John F. Kennedy International Airport or the passenger terminal known as the Air-Shuttle terminal at La Guardia Airport except pursuant to a permit from the Eastern Station Manager at each such passenger terminal.

(a) An application for a permit on a form provided by Eastern (a sample of which is attached hereto) must be submitted during normal business hours (9:00 a.m. to 5:00 p.m.) to the Eastern Station Manager at the respective airport at least 24 hours but not more than one calendar week before the date proposed for the distribution of the materials.

(b) The permit shall be effective for up to seven (7) calendar days. However, the Eastern Station Manager may in his discretion limit the effective period of the permit to no more than one calendar day or extend the effective period of the permit to up to two calendar weeks. The permit will be effective only for the dates and at the times specified on it and at any one time no more than one permit will be issued to any group or person. No permits will be issued for the peak traffic periods referenced in paragraph

16 and set forth below except in accordance with the provisions of paragraph 16.

(c) A copy of this permit will be in the possession of at least one person in the group distributing material at all times that the group is present in the passenger terminal.

(d) The permittee will report to the Eastern Station Manager each day prior to the commencement of the distribution of the material.

(e) Permits will be issued on the basis of the chronological dates on which the application for the permit is received by Eastern.

(f) The permit may be revoked at any time if the person or group violates the rules set forth herein.

20. John F. Kennedy International Airport

Distribution shall be permitted at the following locations in the passenger terminal;

(1) Upper Level –

(a) Three (3) persons shall be permitted to distribute literature in the "waiting room" area of the concourse – generally the area that is carpeted and contains chairs available for passengers and other persons having business in the terminal. Distribution is also permitted in the area immediately adjacent to this "waiting room" area and in such other areas not otherwise limited in the general rules set forth above. (Area A)

(b) One (1) person shall be permitted to distribute literature in the walkway at the rear of the terminal between the shops. (Area B)

(2) Lower Level –

(a) One (1) person shall be permitted to distribute literature in the walkway outside the baggage claim area. (Area C)

(3) No distribution will be permitted during the following peak traffic periods of each year except as provided in paragraph 16:

(a) December 20 – December 25

(b) January 1 – January 7

(c) Weekend before Easter Weekend – Friday through Sunday

(d) Thursday before Easter through the Weekend after Easter Weekend

(e) Thursday before Labor Day through the Tuesday after Labor Day

(f) Tuesday before Thanksgiving through the Monday after Thanksgiving

(g) Any other period when traffic forecasts indicate that passenger traffic in the terminal shall substantially exceed that which occurs on a normal day.

(4) No more than a total number of five (5) persons from one or more groups will be permitted to distribute literature throughout the terminal.

21. LaGuardia Airport

(1) Distribution shall be permitted at the following location in the main passenger terminal.

(a) One (1) person shall be permitted to distribute literature in the rear portion of

the terminal immediately adjacent to the public walkway at the back of the terminal (Area A).

(2) Distribution shall be permitted at the following location in the Air-Shuttle terminal.

(a) One (1) person shall be permitted to distribute literature in the open areas of the main terminal not otherwise limited in the general rules set forth above. (Area A) Distribution shall be permitted in the area of the writing counters in the terminal but persons standing at these counters shall not be approached.

(b) One (1) person shall be permitted to distribute literature in the "waiting room" area of the terminal – generally the area that is carpeted and contains chairs available for passengers and other persons having business in the terminal. (Area B)

(3) No distribution will be permitted during the following periods of each year except as provided in paragraph 16.

(a) December 21 – December 25

(b) January 1 – January 4

(c) Weekend before Easter Weekend – Friday through Sunday

(d) Thursday before Easter through the Weekend after Easter Weekend

(e) Thursday before Labor Day through the Tuesday after Labor Day

(f) Tuesday before Thanksgiving through the Monday after Thanksgiving

(g) Any other period when traffic forecasts indicate that passenger traffic in the terminal shall substantially exceed that which occurs on a normal day.

(4) (a) No more than a total number of one (1) person from a group will be permitted to distribute literature throughout the main terminal.

(b) No more than a total number of two (2) persons from one or more groups will be permitted to distribute literature throughout the Air-Shuttle terminal.

(22) As used herein, the term "passenger terminal" shall mean the areas leased to Eastern for its exclusive use from the Port Authority of New York and New Jersey.

Newark International Airport

Eastern is one of four (4) airline tenants in Terminal B, the passenger terminal at Newark International Airport. Eastern does not have exclusive control in Terminal B of any of the common areas open to passengers and other persons having business in the terminal. Under their individual leases, control of those areas rests jointly in the four airline tenants.

The attached rules for the distribution of religious material in the areas set forth below at Terminal B are acceptable to Eastern. These rules and the procedures contained therein have not been approved by any other air carrier tenants at Terminal B. However, Eastern will take no unilateral action nor be a party to any action to interfere with the distribution of religious material in Terminal B provided that such distribution is made in

accordance with these rules and in the areas set forth below. Distribution shall be permitted at the following locations in Terminal B:

(1) Upper level –

(a) Two (2) persons shall be permitted to distribute literature in the "waiting room" area of the concourse – generally the area that is carpeted and contains chairs available for passengers and other persons having business in the terminal. Distribution is also permitted in the area immediately adjacent to this "waiting room" area and in such other areas not otherwise limited in the general rules. (Area A)

(2) Concourse Level –

(a) Two (2) persons shall be permitted to distribute literature in the "waiting room" area of the concourse – generally the area that is carpeted and contains chairs available for passengers and other persons having business in the terminal. Distribution is also permitted in the walkways and other areas on the concourse level and in such other areas on the concourse level not otherwise limited in the general rules. (Area B)

(b) No distribution whatsoever shall be permitted in the walkways leading out from the concourse and to the gate areas.

(3) Lower Level –

(a) Two (2) persons shall be permitted to distribute literature in the walkway outside the baggage claim area. (Area C)

(4) No more than a total number of six (6) persons from one or more groups will be permitted to distribute literature throughout Terminal B. However, Eastern's Station Manager may in his discretion permit a distribution of persons different from that set forth above; e.g., 0 persons – lower level, 4 persons – concourse level, 2 persons – upper level.

(5) No distribution will be permitted during the following peak traffic periods of each year except as provided in paragraph 16.

(a) December 20 – December 25

(b) January 1 – January 7

(c) Weekend before Easter Weekend – Friday through Sunday

(d) Thursday before Easter through the Weekend after Easter Weekend

(e) Thursday before Labor Day through the Tuesday after Labor Day

(f) Tuesday before Thanksgiving through the Monday after Thanksgiving

(g) Any other period when trafile forecasts indicate that passenger traffic in the terminal shall substantially exceed that which occurs on a normal day.

PERMIT APPLICATION

This application is submitted for permission to distribute religious material at the Eastern Air Lines, Inc. (Eastern)

passenger terminal checked below in accordance with Eastern's rules for the distribution of written, printed or pictorial religious material.

This application must be submitted during normal business hours (9:00 a.m. to 5:00 p.m.) to Eastern's Station Manager at least thirty-six (36) hours but not more than one calendar week before the date proposed for the distribution of the materials.

Name of Sponsoring Organization/ Group	Organization/ Group Address	Telephone Number
Name of Organization/ Group Representative	Address of Organization Group Representative	Telephone Number

Check One:

_____ John F. Kennedy International Airport

_____ La Guardia Airport – Air-Shuttle Terminal

_____ Newark International Airport

Date of Proposed Distribution ____

Time of Proposed Distribution ____

Date Application Submitted _____

Time Application Submitted _____

I have read Eastern's rules for the distribution of written, printed or pictorial religious material.

By _____

PERMIT

Date of Issuance _____ Expiration Date _____

A copy of this permit will be in the possession of at least one person in the sponsoring group/organization distributing material at all times that the group is present in the passenger terminal.

The permittee will report to the Eastern Station Manager or his/her designee each day prior to the commencement of the distribution of the material.

This permit is subject to the Eastern rules referred to above.

By _____
Station Manager

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Plaintiffs,

-against-

WALTER LEE, Superintendent of the Port Authority Police, individually and in his official capacity, et al.,

Defendants.

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Index No.
75 Civ 5388
(RLC)
Answer

To: Jeremiah S. Gutman, Esq.
Eugene N. Harley, Esq.
Levy, Gutman, Goldberg & Kaplan
Attorneys for Plaintiffs
363 Seventh Avenue
New York, New York 10001

Defendant, WALTER LEE, named individually and in his official capacity as Superintendent of Police for the Port Authority of New York and New Jersey (Port Authority), by his attorney, Patrick J. Falvey, answering the complaint of plaintiffs, respectfully alleges and shows as follows:

AS AND FOR AN ANSWER TO THE FIRST CAUSE OF ACTION:

1. Denies each and every allegation in the paragraphs designated "FIRST", and "ELEVENTH" of the complaint.

2. Denies knowledge sufficient to form a belief as to the truth of each and every allegation of paragraphs designated "SECOND", "THIRD", "FOURTH", "SIXTH", "SEVENTH", "EIGHT" and "NINTH" of the complaint.

3. Denies each and every allegation of paragraph designated "FIFTH", except admits that defendant WALTER LEE is employed by the Port Authority and, at all times mentioned herein, has acted in his official capacity as the Superintendent of Police of the the Port Authority, a government agency of the States of New York and New Jersey created in 1921 by compact between them, which was consented-to by Congress; that the Port Authority operates under leases with the cities of New York and Newark, John F. Kennedy International Airport and LaGuardia Airport in the State of New York and Newark International Airport in the State of New Jersey, respectively; and that defendant WALTER LEE, as the Superintendent of Police, is chiefly responsibie for the enforcement of applicable New York and New Jersey criminal laws.

4. Denies each and every allegation of paragraph designated "TENTH" of the complaint except admits that John F. Kennedy International, LaGuardia and Newark International Airports are operated and policed by the Port Authority; and that, in his capacity as Superintendent of Police, defendant LEE is responsible for the security and the enforcement of the criminal laws in areas of said airports which are under the control of the Port Authority and, upon the request or complaint of a tenant, in areas wholly leased to such tenant or tenants which are under the dominion and control of said tenants; and that space in air terminals, located at the said airports, is

leased or under license to tenants which include airlines, food concessions, shops, news-stands and other businesses. Defendant requests the Court's permission to refer the terms of lease and/or license agreements at the time of trial with respect to obligations as to police and security within areas covered by those agreements, and respectfully refers all questions of law to the court.

5. Denies each and every allegation of paragraph designated "TWELTH" of the complaint except admits that Section 1260.13 of the Port Authority Regulations provides that "No person shall post, distribute or display signs, advertisements, circulars, printed or written matter at an air terminal without permission". Section 1260.14 states that "No person shall solicit funds for any purpose at an air terminal without permission". Section 1260.15 in its entirety provides that "No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal: (a) sell, or offer for sale any article of merchandise; or (b) solicit any business or trade, including the carrying of baggage for hire; the shining of shoes or bootblacking; or (c) entertain any persons by singing, dancing or playing any musical instrument; or (d) solicit alms.

6. Denies each and every allegation of paragraph designated "THIRTEENTH" of the complaint except admits that Section 1260.1 (h) provides that "permission shall mean permission granted by the manager, unless otherwise specifically provided." Section 1260.1 (e) provides that "manager shall mean the Port Authority manager or other Port Authority official in charge of an air terminal, or his duly authorized representative."

7. Denies each and every allegation of paragraph designated "FOURTEENTH" of the complaint except admits that the Port Authority, through its agents, has granted permission to plaintiffs to distribute literature and solicit contributions within appropriate public areas of air terminals located at John F. Kennedy International and LaGuardia Airports; and that plaintiffs have been advised that they should seek permission for the distribution of literature and the solicitation of funds from the airlines who have leased or subleased, and who do exercise dominion and control over, the premises of air terminals located at Newark International Airport.

8. Denies each and every allegation of paragraph designated "FIFTEENTH" of the complaint except admits that the Port Authority, through its agents, has not the right to grant and has not granted to plaintiffs permission to distribute literature and solicit funds in areas leased to an airline or airlines and over which areas these airlines exercise dominion and control; and that defendant LEE, as the Port Authority's Superintendent of Police, is responsible for the enforcement of the criminal law at the Port Authority's airports. Defendant respectfully refers all questions of law to the court.

9. Denies each and every allegation of paragraph designated "SIXTEENTH" of the complaint except denies information or knowledge sufficient to form a belief as to the truth of plaintiffs' allegation that the airline defendants "have vested economic interest in minimizing the presence of unpopular groups, including plaintiffs, soliciting from the licensees' customers" and admits that Port Authority officials have not delegated or sub-delegated any discretion vested in them to grant permission for the

distribution of literature and the solicitation of funds to any person or entity and that the Port Authority, at its airports, has leased space and granted rights to airlines, and others. Defendant respectfully refers all questions of law to the court.

10. Denies each and every allegation of paragraph designated "SEVENTEENTH", "EIGHTEENTH", "NINE-TEENTH", "TWENTIETH" and "TWENTY-FIRST" of the complaint, and respectfully refers all questions of law to the court.

AS AND FOR AN ANSWER TO THE SECOND CAUSE OF ACTION

11. With respect to paragraph designated "TWENTY-SECOND" of the complaint, defendant repeats, reiterates and realleges each of his admissions and denials answering paragraphs designated "FIRST" through "EIGHTEENTH" of the complaint with the same force and effect as if fully set forth at length herein.

12. Denies each and every allegation of paragraph designated "TWENTY-THIRD" of the complaint except denies information or knowledge sufficient to form a belief as to the truth of plaintiffs' allegation that the airline defendants "have vested economic interests in minimizing the presence of unpopular groups, including plaintiffs, soliciting from the licensees' customers" and admits that under agreements between the Port Authority and some of the airlines named in the caption of plaintiffs' second cause of action and under agreements between some of the airlines themselves, said airlines are tenants and sub-tenants at the air terminals located at

Newark International Airport; and that there are concessionaires who also tenant some areas in the air terminals. Defendant respectfully refers all questions of law to the court.

13. Denies each and every allegation of paragraphs designated "TWENTY-FOURTH", "TWENTY-FIFTH," "TWENTY-SIXTH", "TWENTY-SEVENTH" and "TWENTY-EIGHT" of the complaint, and defendant respectfully refers all questions of law to the court.

AS AND FOR THE ANSWER TO THE THIRD CAUSE OF ACTION

14. With respect to paragraph designated "TWENTY-NINTH" of the complaint, defendant repeats, reiterates and realleges each of his admissions and denials in answering paragraphs designated "FIRST" through "EIGHTEENTH" of the complaint with the same force and effect as if fully set forth at length herein.

15. Denies each and every allegation of paragraphs designated "THIRTIETH" and THIRTY-SECOND" of the complaint.

16. Denies each and every allegation of paragraph designated "THIRTY-FIRST" of the complaint except denies information or knowledge sufficient to form a belief as to the truth of plaintiffs' allegation that the defendant Eastern Airline has "vested economic interest in minimizing the presence of unpopular groups, including plaintiffs, soliciting from the licensees' customers" and admits that the Port Authority has not delegated its

power, if any, to defendant Eastern Airlines to promulgate regulations (a copy of which is annexed to the complaint as Exhibit A); and that Eastern Airlines, pursuant to lease agreements with the Port Authority, has rights with respect to areas leased to it at Port Authority airports, and defendant requests the Court's permission to refer to said lease agreements at the time of trial and, further, respectfully refers all questions of law with respect thereto to the Court.

17. Denies knowledge sufficient to form a belief as to the truth of each and every allegation of paragraphs designated "THIRTY-THIRD" and denies each and every allegation of paragraph designated "THIRTY-FOURTH" of the complaint.

WHEREFORE, defendant respectfully prays for a judgment dismissing plaintiffs' complaint, plus attorney's fees, costs and disbursements, and such other and further relief as may seem to this court just and proper.

Dated: New York, New York
December 29, 1977

/s/ (P.J.F.)
Patrick J. Falvey
Attorney for Port Authority
Defendant Walter Lee
One World Trade Center
New York, New York 10048
Telephone (212) 466-8794

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Plaintiffs,

– against –

WALTER LEE, et al.,

Defendants.

AFFIDAVIT

75 Civ. 5388 (MJL)

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STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

PHILIP Le B. DOUGLAS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Hale Russell & Gray, attorneys for the Air India group of defendants in this action. I make this affidavit in opposition to plaintiffs' motion for a protective order concerning interrogatories and document demands served by the Air India defendants on July 16, 1984 (collectively "Second Air India Interrogatories"). In this case, plaintiffs – the international "Krishna Consciousness Movement" and Brian Rumbaugh – seek to perform "sankirtan", i.e. solicit funds, in privately-leased areas of the International Arrivals Building at John Fitzgerald Kennedy International Airport. To rebut plaintiffs' contention that sankirtan is a religious activity protected by

the First Amendment, the Second Air India Interrogatories seek information concerning plaintiff's solicitation practices, the involvement of high Krishna officials in those practices, and the manner in which sankirtan-derived funds are used.

2. Plaintiffs' motion seeks to preclude any inquiry whatsoever into Hare Krishna governance, solicitation methods or financial affairs. According to plaintiffs, any such inquiry would be (1) irrelevant and not likely to lead to the discovery of relevant evidence; (2) violative of plaintiffs' rights of privacy and religious freedom; and (3) unduly burdensome and oppressive. Plaintiffs characterize the Air India interrogatories as "wildly" irrelevant, "not reasonably calculated to lead to the discovery of admissable evidence" and ludicrously off-beam." (Memorandum of Law in Support of Plaintiffs' Motion for Protective Order with Respect to Air India Interrogatories at 2-3). Strongly implying that defendants' recent interrogatories were propounded in bad faith to "coerce" a settlement, plaintiffs contend that "[g]iven the substantial religious liberty and privacy interests, which are threatened by the discovery, defendants have failed to demonstrate that the information sought is sufficiently relevant to *this* lawsuit to justify disclosure." (Reply Memorandum in Support of Plaintiffs' Motion for Protective Order Concerning Air Canada Interrogatories at 3) (emphasis in original).

Plaintiffs' Claims Should Be Dismissed Out Of Hand For Failure to Comply With Local Rule 3(f)

3. Before turning to plaintiffs' claims that defendants discovery requests are irrelevant and in bad faith, I wish to briefly address their contention that the interrogatories are ambiguous, overbroad and unduly burdensome. The Air India defendants respectfully submit that these claims should be summarily dismissed for failure to comply with Local Rule 3(f) of this Court. As is evident from the fact that their motion papers are not accompanied by the affidavit required by Local Rule 3(f), plaintiffs have never sought to confer with defendants in an effort to clarify allegedly unclear interrogatories and to lessen the burden of any discovery requests. Indeed, plaintiffs have declined my request for such a conference. Immediately following a status conference before Magistrate Dolinger on August 6, 1984, I asked David M. Liberman, Esq. and Eugene N. Harley, Esq. to meet with me in an effort to resolve their objections to the interrogatories. Messrs. Liberman and Harley's only response, however, was that the interrogatories were objectionable *in toto*.

4. I have reviewed the August 17, 1984, affidavit of plaintiff Brian Rumbaugh claiming, among other things, that the document production requested by defendants "would be extremely burdensome and damaging" because "[m]embership in the [New York] temple is currently less than half of what it was when this lawsuit began." (8/17/84 Rumbaugh Aff. ¶11). This "critical shortage of personnel" is asserted as a ground for denying defendants' any discovery whatsoever. (*Id.*) This contention is spurious. As the complaint in this case asserts, plaintiffs are not merely a "New York temple," they are in

fact "all members of the International Society for Krishna Consciousness, Inc." which is defined in the complaint as "an international religious society . . . [that] maintains temples and schools in cities throughout the United States." (First Amended Complaint ¶3). As will be set forth in great detail below, this worldwide movement has thousands of followers who devote their services free of charge and who are capable of raising, through sankirtan, hundreds of thousands of dollars in a matter of days. This powerful organization has financed dozens of expensive lawsuits around the nation. Indeed, plaintiffs have prosecuted this particular case for almost ten years represented by a stable of three law firms, at least some of which are being paid on a hourly basis. In any event, as noted above, the Air India defendants stand ready to discuss reasonable ways of relieving any unnecessary burden.

The Air India Group's Review of the Public Record Concerning Plaintiffs' Solicitation Methods

5. Prior to propounding its interrogatories, the Air India defendants undertook a preliminary inquiry into the public record concerning plaintiffs' activities over the past decade. What has emerged from this necessarily brief and limited investigation are shocking allegations indicating that the International Society for Krishna Consciousness, Inc. ("ISKCON") has been operating in a manner more akin to a racketeering enterprise than a religion. As will be set forth in detail below, the public record reveals allegations of widespread and massive fraud, extortion, murder, assault, large-scale weapons dealing, heroin trafficking and investments in profit-making

enterprises. As a consequence, defendants seek discovery which they believe will demonstrate that, in the words of the United States District Court for the District of New Jersey in the Meadowlands case, that sankirtan "is no more than a 'confidence' operation designed to obtain all the money possible," *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, 552 F. Supp. 1088, 1110 (D.N.J. 1981), *aff'd*, 691 F.2d 155 (3d Cir. 1982), and that the funds obtained by this "confidence operation" are diverted to secular and even criminal purposes. Thus, rather than being irrelevant, in bad faith or "ludicrous", the discovery sought by defendants is amply warranted and vital to their defense of this case. Indeed, without this information, defendants will not be able to respond to the Second Court's request in its remand opinion for evidence of the true "nature" of sankirtan and defendants' "justification" for precluding this practice in their leaseholds. *See International Society for Krishna Consciousness, Inc. v. Air Canada*; 727 F.2d 233, 256 (2d Cir. 1984) (per curiam).

6. Outlined below is evidence gleaned from the public record by the Air India defendants relating to plaintiffs' governance, sankirtan practices and use of sankirtan-derived funds. While some of this evidence is derived from unverified sources, strong corroboration is provided by the consistency of these allegations over the years.

A. Plaintiff's Control Over World-Wide Solicitation Practices and the Use of Sankirtan Funds

7. Plaintiffs object to the Second Air India Interrogatories, in part, because they seek information about

activities outside of the New York area. Thus, it is asserted that any inquiry should be limited to "the single corporation" and "single individual" who are allegedly plaintiffs in this case. (Plaintiffs' Motion for Protective Order at 2). This assertion is typically disingenuous. As noted above, the pending complaint is brought "on behalf of all members of the International Society for Krishna Consciousness, Inc." which is defined as "an international religious society . . . [that] maintains temples and schools in cities throughout the United States." (First Amended Complaint ¶ 3). In an obvious attempt to narrow defendants range of discovery, plaintiffs are now seeking to amend their complaint to exclude from the plaintiffs' group, Hare Krishna organizations and devotees located outside of the New York region. The Air India defendants, of course, oppose this eleventh hour maneuver.

8. However, even if plaintiffs' motion is granted, discovery concerning Krishna activities across the country would be proper. As will be demonstrated below, defendants have reason to believe, and seek discovery in order to prove, that: (1) plaintiff ISKCON as an institution directs the fraudulent solicitation of funds on a massive scale; and (2) at least some of these funds are not used for religious purposes but instead are spent on real estate, personal luxuries, weapons and narcotics. The discovery sought is necessary to prove that, rather than being the unauthorized actions of renegade members, solicitation fraud is a secret policy of the plaintiff, one which has been approved at the highest international levels of the organization.

9. At his April 14, 1979 deposition in this case, named plaintiff, Brian Rumbaugh, a/k/a "Romapada Das," a/k/a "Romapada Swami", testified that all local groups around the globe associated with the Hare Krishna movement are centrally controlled by an international entity known as the Governing Body Commission ("GBC"). (4/24/79 Rumbaugh Deposition at 30). Thus, Rumbaugh testified, the same GBC member who controls the United States is also responsible for Western Europe (*Id.* at 36). According to Rumbaugh, one of the GBC's "primary responsibilities" is to ensure that the local practices are uniform. (*Id.* at 33). The GBC's standards in this regard are "explicit" and vigorously enforced: "They are strict, very clear and they are strictly upheld." (*Id.*). Devotees from other parts of the country came to the New York region to conduct sankirtan here and New York Krishna members travel to other regions. (*Id.* at 111, 113). Although Mr. Rumbaugh was aware of a large number of frauds and violence involving devotees, (*id.* at 94, 101-104, 178, 185-87, 192, 197, 200, 213-15 220), no member has ever been expelled from the organization because of sankirtan activities. (*Id.* at 122-123).

10. Newspaper articles indicate that, in connection with a $9.7 million awarded to a woman who proved that she had been kidnapped and brainwashed by plaintiff ISKCON, a California court held that a purported "decentralization" of the organization into separate regional units and various not-for-profit corporations was in fact nothing more than an effort to evade the judgment. Finding that the New York, California, Louisiana and Canadian branches of the Hare Krishna movement conspired to siphon assets to shell corporations, the Court held: "It

is clear that the Governing Body Commission controls, to whatever extent it wishes, actions of the various corporate defendants." (The Associated Press story reporting this decision is annexed hereto as Exhibit A).

11. Our investigation reveals that fraud appears to be an approved aspect of sankirtan known as "transcendental trickery." As will be described below, many former devotees have related how they were taught to lie and steal. According to one account by a former Krishna member who spent five years in nearly a dozen Canadian and eastern United States Krishna "temples," devotees are "told to beg for donations and make up the names of needy causes," and he actually solicited donations for a fictitious "Fund for Homeless Children." (This article is annexed hereto as Exhibit B).

12. In an in-depth interview Ed Senesi, who at one time had been editor-in-chief of the official Krishna magazine *Back to Godhead* and had also served as general manager of the entire editorial and graphic arts division of the Bhaktivedanta Book Trust, ISKCON's publishing arm, explained how fraud was an inherent part of sankirtan. (A copy of this interview is annexed hereto as Exhibit C). Among other things, he related how the movement's sankirtan efforts were centered around "transcendental trickery" or "heavenly deception." According to Senesi, plaintiff ISKCON's leaders have instructed their followers that any means advancing the cause of Krishna is justified by the ends. Because the money in a potential donor's wallet was believed to be stolen from Krishna, Senesi said the Krishnas believe they have "the right – not only the right, but the duty – to take that money from you, even if [they] have to trick you, because by getting

that money from you [they] are getting Krishna's stolen money back." (Ex. C at 10). Senesi continued:

> "So they had to use these shuck-and jive, conman techniques to get the books to people, and to get the money out of their wallets. They'd lie, cheat, and do things like tell them, 'We are with muscular dystrophy,' 'We are with the Salvation Army; won't you give us money?' 'We are feeding children all over the world.' And the Americans, being big hearted, would go for it and give them money. This is going on even to this day. That's how the movement changed. It got so deceptive that anything went, because the mission was so important." *Id.*

According to Senesi, when he reported the deceptive solicitation techniques to A.C. Bhaktivedanta Swami Prabhupada, the founder of ISKCON, the Swami responded that books must be distributed, "by hook or by crook," and that the deceptive techniques were not matters of concern, because the end justified the means. (*Id.*)

B. Fraudulent Practices

13. The public record is replete with reports of widespread fraud apparently committed at plaintiffs' direction over the course of more than a decade. For example, in the June 24, 1980 edition of the *Sacramento Bee*, it is reported that one Hans Kary, a/k/a "Jack London," a/k/a "Srila Hansadutta Swami Maharaja", was one of the sect's earliest adherents and, in 1974, headed ISKCON operations in Germany. It is reported that in 1974, German authorities arrested Kary and other

Krishnas on charges of "begging under false pretenses." The German prosecuter is reported as having established that Kary and his accomplices collected $1.1 million in only seven months, primarily by telling donors that the money would be sent to an ISKCON temple in India to feed starving children. The article indicates that, in fact, only $6,900 was ever sent to India and that even this sum was not used to benefit children. In 1978, Kary and eight other devotees were reportedly convicted of the false pretense charge and ordered to pay substantial fines. (*Sacramento Bee*, June 22, 1980). (Copies of these articles are annexed hereto as Exhibit D). Despite his criminal record, Kary was subsequently appointed one of the ruling gurus of the worldwide Hare Krishna movement, with unquestioned power and authority. (*Id.*). Some evidence of what Kary did with funds collected for "starving children" is found in a May 13, 1980, article in the *Sacramento Bee*. In May 1980, Kary was reportedly in control of California operations for plaintiff ISKCON. At that time, Kary was apparently again arrested for possession of an Ingram Mac 10 9mm. machine gun, a loaded clip for that weapon, two assault rifles, two hunting rifles and three loaded handguns. These weapons were found in an illegally-imported Mercedes Benz belonging to Kary. (Ex. E). These charges were dropped when a Krishna aide to Kary claimed ownership of the weapons.

14. Further evidence of fraudulent Krishna solicitation comes from the November 22, 1975 edition of the *Los Angeles Times*. (This article is annexed hereto as Exhibit F). The article reports that in 1975 complaints to the police about solicitation techniques used by members of

the San Diego Hare Krishna temple prompted an investigation by the City Auditor's Office of the temple's financial records. Although the Krishnas reportedly collected more than $250,000 in the period February 1974 to June 1975 on behalf of "starving children and suffering people of the world," even by the Krishnas' own admission, only 3% of those funds were used for that purpose.

15. In 1976, the San Diego *Union* reported that Hare Krishna solicitors were alleged to have intimidated and used physical force against children 6 to 12 years old who were soliciting contributions for the Muscular Dystrophy Association at the San Diego Zoo and Sea World. Apparently the Krishnas, who were dressed up in Revolutionary War-period costumes to exploit the Bicentennial spirit, resented the competition from a legitimate charity for prospective donors' contributions. (The San Diego *Union* article is annexed hereto as Exhibit G).

16. Plaintiff Brian Rumbaugh has admitted to participating in similarly deceptive practices. At his deposition in this case, Rumbaugh conceded that, in the approximate period 1974-1979, the New York Temple which he headed, solicited funds during the Christmas season by dressing devotees in Santa Claus costumes and having them hand out candy canes. (4/24/79 Rumbaugh Deposition at 101-103). Rumbaugh also acknowledged that in Grand Central Station, one devotee performed sankirtan by pretending to be from a radio station (*Id.* at 212) and, in the International Arrivals Building, a crippled girl in a wheelchair and other women were used to solicit donations. (*Id.* at 220).

17. Substantial evidence of deceptive Krishna practices in 1978-1979 were adduced at a trial in the Northern District of New York of plaintiff ISKCON's suit seeking not to have their solicitation efforts at the New York State Fair restricted to booths:

> "Several fairgoers testified that ISKCON members approached them and initiated discussion by either pinning a flower or button on their lapel without permission or by placing a record in their hand. Identification badges [required by court order] frequently were not worn, or were hidden beneath sweaters or the straps of shoulder bags that ISKCON devotees typically carry.
>
> Discussions of a religious nature rarely followed; instead devotees would vaguely ask for a contribution to help "starving children" or "drug addicts." Witnesses testified that devotees portrayed themselves as representatives of contests giving away records to the 50 best looking couples or as radio station employees offering a record if the fairgoer named the correct radio station. Several fairgoers stated that when the Krishnas handed them record albums, they were led to believe that performances by several notable "stars" – including George Harrison, Stevie Wonder and Bob Marley appeared on the albums. In fact, small print on the record jackets indicated that these performers only "contributed to" or "supported" the ISKCON movement.
>
> Evidence was also presented that many devotees cajoled fairgoers into giving larger contributions and attempted to shortchange donors by folding over bills and by distracting the fairgoers with conversation while providing

> change. Devotees also on occasion "targeted" their contributors, approaching those most likely to succumb to pressure to contribute – young couples with small children, teenagers, handicapped individuals, and groups of retarded persons. . . .
>
> * * * *
>
> The state also presented testimony of a former Krishna member, who stated that she was explicitly taught to lie and deceive members of the public when engaging in sankirtan.

International Society for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 436-37 (2d Cir. 1981).

18. In October 1979, the Raleigh, North Carolina *News and Observer* reported that Raymond Kissane, a member of the New York City Krishna community, was arrested and charged with three felony counts of obtaining money under false pretenses. (A copy of this article is annexed hereto as Exhibit H). Kissane reportedly took large bills from patrons at the North Carolina State Fair, saying he would make change, but refused to return the correct amount of change. Among the other complaints registered by fairgoers were allegations that the Krishnas: (1) had taken money from a blind adult and a retarded blind child; (2) had refused to give people change back for large bills; (3) had asked for large bills in exchange for smaller bills and then failed to provide the change; (4) had handed record albums to fairgoers and then snatched the records back if they were not given money; and (5) had tricked children into giving them donations. Kissane subsequently pleaded no contest to the North Carolina charges. Thereafter, he was given a six-month suspended

jail sentence, fined, and ordered to make restitution to his victims. Kissane was no stranger to court proceedings, having previously been convicted in other jurisdictions of soliciting without a permit on private property, obstructing an officer by providing false information, soliciting without a license, and disorderly conduct. (*See* Defendant's Exhibit BU, *ISKCON v. Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980), *rev'd*, 650 F.2d 430 (2d Cir. 1981)).

19. In November 1981, the *Boston Sunday Globe* reported that Kissane and two other Krishnas were arrested in the Bangor, Maine area and charged with felony theft by deception in connection with an "art scam" whereby cheap, mass-produced paintings were sold to unsuspecting customers for exorbitant prices through misrepresentation. (A copy of this article is annexed hereto as Exhibit I). Kissane and the others, who claimed to represent Fine Arts Studio in New York, were reportedly arrested meeting "with a regional Hare Krishna representative to whom the three allegedly gave the money they obtained in sales." *Id.*

20. In September 1981, Beloit, Wisconsin police arrested Mark J. Bass and Jonathan Rhodes for felony theft through misrepresentation. The two, who were associated with plaintiffs' Moundsville, West Virginia temple, had allegedly masqueraded as Vietnam veterans, telling people at a shopping center they were collecting funds to help other Vietnam veterans hospitalized because of contact with Agent Orange. Rhodes subsequently pleaded guilty to this charge and was fined $1,000. Bass jumped bail. (Copies of articles concerning the arrests and guilty plea are annexed hereto as Exhibit J).

21. Bass, however, was reportedly arrested again in Albany, New York in May 1982 with another Krishna member and charged with conducting a similar fraud. (A copy of this article is annexed hereto as Exhibit K). According to news reports, Bass and Krishna member Brooke Brady told potential donors at a shopping center that they were soliciting to take patients at the Albany Veterans Administration Hospital to sporting events and other community activities. Unfortunately for the two Krishnas, they made the mistake of trying to solicit a donation from the recreational director of that hospital, who promptly reported them to the police. When arrested, the two Krishnas reportedly had in their van 37 letters from Veterans Administration hospitals in many parts of the country, which they apparently used as "authorization" for soliciting. The letters were all addressed to Nandagram Boys School. (*See* Interrogatory No. 45).

22. That violence and intimidation may also be inherent in sankirtan is demonstrated by an injunctive action brought by the City of Los Angeles as a result of Krishna activities at Los Angeles International Airport ("LAX"). *City of Los Angeles v. International Society for Krishna Consciousness, Inc.*, Docket No. C-270320 (Super. Ct. L.A. Co. 1978). In one affidavit submitted in support of the Los Angeles injunctive action, an airport guide, who had closely observed the activities of Krishna solicitors over a three-year period, stated that she witnessed numerous instances in which Krishna devotees had claimed to be soliciting for "educational purposes" or "an organization for children" and that religion was never

mentioned in any solicitation she observed. This declarant also witnessed Krishnas shortchanging foreign travelers unfamiliar with American currency or exchange rates, as well as instances where Krishnas had failed to provide correct change to donors. The declarant stated that she received approximately 20 complaints per day about Krishna solicitation techniques. As a result of voicing objections to the Krishnas' methods and warning passengers of the identity of the solicitors, the guide testified that she received death threats and was otherwise intimidated by the Krishnas. (Declaration of Carol Breidenbach, dated November 30, 1978, annexed hereto as Exhibit L).

23. In another supporting affidavit, Gloria Conklin, an insurance counter employee at LAX, stated that she witnessed a male Krishna solicitor approach a young teenage girl to request a donation. After the girl's mother indicated that they did not wish to make a donation and repeatedly asked to be left alone, the Krishna member forced them backwards until the mother and daughter were forced up against the insurance counter. At this point, the girl began crying, and her mother asked Ms. Conklin to call the police. The mother then slapped the Krishna member, who was prevented from striking her with his fist by a third party. After Ms. Conklin confronted a Krishna devotee about these solicitation methods, she was followed through the airport to her car by a male Krishna member and was apprehensive for her safety. Ms. Conklin also stated that she witnessed a female Krishna devotee soliciting funds from Hispanic people by claiming that the money would go to the"Catholic Relief Mission." She also observed the same

Hare Krishna member solicit a donation from a young man in a U.S. Navy uniform. The Krishna said that she was "from a society to bring the M.I.A.'s home from Vietnam." The serviceman, remarking that it was for a good cause, endorsed his whole paycheck to the female devotee. (Declaration of Gloria Conklin, dated October 13, 1978, annexed hereto as Exhibit M).

24. Victor C. Hernandez, [sic] a passenger at LAX, submitted an affidavit describing an attempt by a Hare Krishna devotee at LAX to perform what is known in Hare Krishna jargon as the "change-up" on him. A devotee asked Mr. Fernandez for money " 'for the children' ". When Mr. Fernandez offered to give her a dollar, the devotee asked him to provide a $20 bill in return for $19 change. When Fernandez gave the devotee a $20 bill, she gave him only $13 back and tried to hand him a book. When Mr. Fernandez refused the book and insisted on his change, the devotee became belligerent, stating that other people gave more money than Mr. Fernandez and that she had already given him back $18 in change. Only after more discussion and argument did the devotee relent and hand Mr. Fernandez the change that was due him. Mr. Fernandez felt that the devotee had obtained money from him under false pretenses by stating that her solicitation was " 'for the children' ". (Affidavit of Victor C. Fernandez, sworn to November 20, 1978, annexed hereto as Exhibit N.)

25. An affidavit was also submitted in the *LAX* case by Pierre Denard, the Air France station manager at LAX. Mr. Denard stated that in September 1978, a group of mayors from the Polynesian Islands, on their way to Paris to meet with French President Giscard d'Estaing, were

proceeding through an LAX terminal when two of the mayors, who spoke only French, were accosted by two male Krishna members. The Krishnas pinned miniature American flags on the mayors' lapels and requested a donation. Each of the mayors gave a 500 French franc note (then approximately equivalent to $120) and awaited their change. The two Krishnas, however, pocketed the money and departed. Still expecting change, the two mayors followed the devotees until a French legislator accompanying them learned of the problem and asked the Krishnas to return the money. In response, one of the Krishnas told the legislator that "he was nothing but a foreigner and that he had best keep his mouth shut because he had no right to interfere with their work." In the end, the Krishnas agreed to return 200 francs (approximately $48). (Declaration of Pierre Denard, dated September 29, 1978, annexed hereto as Exhibit 0).

26. Even more appalling conduct was related in the declaration of Paul Marks submitted in the LAX case. Mr. Marks, a mechanic for Western Airlines, stated that, because a fellow mechanic had ripped up a Hare Krishna book which had been left lying in the terminal area, two male Hare Krishna members verbally abused Mr. Marks and, when he tried to avoid an altercation, one of the devotees punched Mr. Marks with what appeared to be a set of brass knuckles. After falling to the ground, Mr. Marks tried to stand up, only to have the devotee kick him in the mouth, knocking three of his teeth through Mr. Marks' upper lip. Mr. Marks required more than 50 stitches to close his wounds. (Declaration of Paul Marks dated November 7, 1978, annexed hereto as Exhibit P).

C. Non-Religious Use of Sankirtan Funds

27. The public record indicates that a substantial portion of sankirtan funds derived from frauds such as those described above may have been used for secular and often criminal purposes. The Second Air India Interrogatories seek to confirm this information by asking for an accounting of the millions of dollars obtained by plaintiffs over the years.

(i) Weapons Purchases

28. One use to which this money may have been put was the purchase of weapons on a massive scale. It was reported in the June 25, 1980 issue of the Lakeport, California *Record-Bee* that members of plaintiffs' Moundsville, West Virginia temple had stockpiled an arsenal of AR-15 assault rifles, hand-guns, riot shotguns and carbines. (A copy of this article is annexed hereto as Exhibit Q). One member of the temple, moreover, was reported to have obtained a federal license to deal in firearms.

29. There have been reports of the stockpiling of arms and ammunitions at several other Krishna temples. In March 1980, for example, the *Record-Bee* reported that police investigating the theft of checks and credit cards belonging to a member of plaintiffs' Berkeley, California temple, obtained a search warrant for a Hare Krishna ranch near Lakeport. The search of the ranch uncovered: (1) a rifle-mounted grenade launcher; (2) an AR-15 combat rifle; (3) a number of other rifles, (4) shortbarrelled shotguns; (5) thousands of rounds of ammunition; (6) a bayonet; and (7) bows and arrows. In later accounts, the police were reported as suspecting that handguns, fully

automatic weapons, stolen dynamite and hand grenades had been spirited away after Krishna members learned that the search was planned. A week later, Berkeley police were reported as having discovered 350,000 rounds of ammunition, 9 tons of gunpowder and bullet-making equipment at the gun shop of a Hare Krishna member, who was arrested on charges of having a fraudulent passport. As already noted, plaintiff ISKCON's highest ranking official in California, Hans Kary, was arrested in May 1980 on weapons charges. (Various newspaper articles reporting these events are collectively annexed hereto as Exhibit R).

30. In June 1980, the Sacramento *Bee* reported that the Sacramento, California Sheriff's Department discovered a cache of weapons and ammunition in a rental locker, which a Hare Krishna official had previously alleged contained only religious supplies. (A copy of this article is annexed hereto as Exhibit S). From the locker, police seized 4 rifles, 4 shotguns, 400 live rounds of ammunition, reloading equipment and supplies, a pistol holster and rifle slings. This seizure came just three days after ISKCON officials had held a news conference in Berkeley at which they claimed: "It is against the policy of the International Society for Krishna Consciousness to keep any stockpile of weapons or ammunition for any reason." (*Id.*).

31. In May 1981, George A. Raczynski, one of plaintiff ISKCON's members, was arrested in Los Angeles after allegedly selling two fully-automatic machine guns to an undercover federal agent. (A copy of the article describing the arrest is annexed hereto as Exhibit T). The arrest of Raczynski came one week after Robert A.

Loretto, another Hare Krishna, had been indicted for possession of an unregistered machine gun. (*Id.*).

(ii) Narcotics Trafficking

32. There is also reason to believe that sankirtan proceeds have been used to purchase large quantities of heroin and other narcotics. In fact, one magazine article terms narcotics trafficking a "major financial pillar of the Krishna movement." Exhibit V *infra*, at 219. For example the June 22, 1980 Sacramento *Bee* reported that on October 22, 1977 Alexander Kulik, an aide to A.C. Bhaktivedanta Swami Prabhupada (hereinafter "Prabhupada"). plaintiff ISKCON's founder, was discovered asleep in a $60,000 Stutz Blackhawk automobile in a parking lot in Orange County, California with more than $1 million worth of "China white" heroin in the back seat. (A copy of this article is annexed hereto as Exhibit U). Kulik was a partner in Prasadam Distributing International (*see* Interrogatory No. 54), a firm which was reported to have laundered drug profits and which allegedly was funded by ISKCON seed money. (*See* Exhibit Y *infra*).

33. The article reported that Kulik had previously been kidnapped by one Steven Bovan, a rival drug dealer, in August 1977 and held for $100,000 ransom. Upon payment of this ransom, Kulik was released. The day before Kulik was arrested with the heroin, Bovan was shot to death. Three alleged Mafia members were arrested for the murder, and Kulik, along with six other Krishna devotees and associates, was charged with hiring Mafia "hitmen" to kill Bovan. According to the magazine account:

"At the trial, Kulik testified that he had traveled around the world as Prabhupada's personal fund raiser for seven years and had funneled him more than $2 million. It came out that the defendants had set up a company, Prasadam Distributing (named after the Krishna word for sanctified food or sustenance) partly, according to a statement from a former associate, to launder funds from the heroin smuggling and other operations.

"Krishna spokesmen claimed all those involved were former members with no connection to the movement. But during the trial, there surfaced a personal letter from Prabhupada that addressed the defendants by first names. Dated nine months before the arrests (and after the smuggling had been underway several years), it congratulated them on setting up Prasadam Distributing and had this curious advice: 'There is no need to engage in anything dishonest. Krishna has given enough money, now earn by honest means.'

"Prabhupada died before the trial date and so could not be called to testify.

"During the trial, the defendants pleaded guilty to charges of conspiring to kidnap Bovan in return for having the murder charges dropped. Kulik and other Krishnas were sentenced for this and a variety of heroin charges."

(This article is annexed hereto as Exhibit V). The article also reported that in April 1979 David Kulik, Alexander's brother, was arrested in London for possession of 65 pounds of hash oil. David Kulik was identified as a member of the Los Angeles ISKCON temple.

34. In April 1980, Gregory Martin Gottfried, a/k/a "Guru Kripta," a high-ranking member of the Krishna movement, was reported to have been arrested trying to smuggle two Kilograms (4.4 pounds) of "Asian white" heroin through the Amsterdam airport. (See Exhibit U, *supra*).

35. In February 1982 stories in the Orange County *Daily Pilot* and The *Register* reported that undercover narcotics agents arrested Roy Christopher Richard for conspiracy to sell more than $1 million worth of "China white" heroin, which heroin was seized from Richard at the time of his arrest. (Copies of these articles are annexed hereto as Exhibit W). Richard, a former president of plaintiffs' Laguna Beach temple, had been among those indicted for conspiracy to commit murder in the 1977 slaying of Stephen Bovan. (*See* ¶33, *supra*). Also arrested with Richard were two other members of the temple.

36. In December 1982, an article in the Philadelphia *Daily News* reported that a federal court in Philadelphia convicted George Flora, a member of that city's Hare Krishna community and a resident of the temple, for conspiracy to distribute three pounds of opium smuggled from India in three Buddhist statues. (A copy of the article is annexed hereto as Exhibit X). Flora claimed that the statues belonged to Victor Doran, the temple vice-president. Doran, who did not stand trial, was believed to have fled to India after being released on bail. In his 1979 deposition in this case, named plaintiff Rumbaugh testified that, as "Regional Secretary" for ISKCON's "Northeastern U.S. Zone", he had personal administrative

responsibility for the Philadelphia temple. (4/24/79 Rumbaugh Deposition at 20).

(iii) Profit-Making Ventures

37. Plaintiffs object to a group of interrogatories (Nos. 34, 35, 36, 37, 38, 45, 46, 47, 49, 51, 52, 53, 54, 55, 56, and 57) which seek information concerning a number of separately incorporated organizations. These interrogatories are designed to untangle the web of Krishna enterprises and ascertain the extent of the profit-making, commercial activities carried on by plaintiffs. Defendants seek to discover any improper diversion of monies by individuals within the Krishna organization. Interrogatory 35, for example, seeks to discover information about Spiritual Sky Scented Products, Inc. Plaintiff Brian Rumbaugh testified at his 1979 deposition in this action that Spiritual Sky was once part of ISKCON but later became a separate profit-making company. (4/29/79 Deposition of Brian Rumbaugh at 67). In fact, it appears that, after Spiritual Sky was established by a Governing Body Commissioner, James Immel, as a profit-making corporation in California in 1975, the New York temple loaned Spiritual Sky $282,000 and negotiated royalty agreements that entitled ISKCON to 7.5% of Spiritual Sky sales. In 1976, plaintiffs' California corporation acquired by deed of gift the interests in Spiritual Sky then held by plaintiffs' New York corporation.* This transaction enabled the California

* This arguably contradicts a statement in a letter "To whom it may concern" dated April 17, 1980 and signed by Gadahara Pandita das, Secretary-Treasuer of ISKCON:

(Continued on following page)

group to benefit from Spiritual Sky sales to Balarama's Enterprises, Inc. (see Interrogatory 51), a private, profit-making incense and oils wholesale distributor. Balarama's earnings were in turn siphoned off by the Bay Area temple. The newspaper account of these dealings also reported allegations that Balarama's Enterprises purchased a $60,000 airplane (see Interrogatories 6, 7, 8) to be used primarily by guru Hans Kary. (This newspaper article is annexed hereto as Exhibit Y).

38. In their motion for a protective order, (Plaintiff's Memorandum at 4) plaintiffs characterize BALA Books (*see* Interrogatory No. 38) as an entity separate from ISKCON. Plaintiff Brian Rumbaugh, however, has testified that BALA "is part of ISKCON, Inc. [and is] not a separate corporation." (*See* 4/29/79 Rumbaugh Deposition at 135). Plaintiffs also imply that Krishna Fashions (*see* Interrogatory No. 49) is not part of ISKCON. Krishna Fashions, however, is listed in an ISKCON financial statement for 1975 as a "subsidiary program". (4/24/79 Rumbaugh Deposition, Ex. 15).

39. Interrogatory No. 52 seeks to discover possible dealings between ISKCON and an entity known as Pin

(Continued from previous page)

> "[W]e do not make compensation to other temples, in as much as each temple is separately incorporated and governed by a separate group of officers. All temples are completely autonomous in their operations with neither financial or managerial dependence on another temple."

This letter was received in evidence by the trial court in *ISKCON v. Barber. supra,* as Defendant's Ex. U.

Up the World. Pin Up the World is a Krishna corporation which reportedly manufactures buttons which Krishnas sell or use when soliciting money from the public. According to one newspaper account, "some of the buttons reputedly advocate non-religious activities, such as reform of the marijuana laws." (*See* Ex. D, *supra*, at 3). One former Krishna reported that devotees sold "Go Orioles" buttons at the 1979 World Series in Baltimore; that at the World Series of Rock that year, they sold buttons advocating the reform of marijuana laws; and that "wherever Pope John Paul II went during his tour of the United States . . . devotees 'were hustling pope buttons for whatever price they could get.' " (*Id.*)

40. Interrogatory No. 53 is aimed at discovering any dealings between the Dey Memorial Trust and plaintiff ISKCON. The trust has as its purpose to exist as an "integrated auxiliary of ISKCON of California and the *international* Krishna movement." (*See* Ex. Y, p. 2) (emphasis added). ISKCON of California, Inc. apparently contributes almost $100,000 per year to the trust, which has substantial real estate holdings. When questioned about the trust, Robert Grant a/k/a "Rameswara Swami", told a reporter that he had never heard of Dey Memorial Trust. Grant, however, had in fact been a Dey Memorial trustee and had signed a conveyance of trust property to a successor trustee.

Conclusion

41. As demonstrated above, the Second Air India Interrogatories were based on substantial evidence that (1) plaintiff ISKCON and its leadership is seeking access

to defendants' terminal areas in order to defraud their customers of huge sums; and (2) these sums may be diverted to secular and even criminal purposes. If the discovery sought by defendants confirms this evidence, the Air India group will be able to answer the Second Circuit's three pronged inquiry on remand in the following manner: (1) The "right . . . asserted by the plaintiffs" in truth is the right to defraud defendants' customers; (2) The "justification" for defendants refusal to permit sankirtan on their property is the legitimate desire to protect customers and employees from fraud and violence; and (3) defendants' prohibition would have little, if any, "effect" on the exercise of legitimate First Amendment rights.

WHEREFORE, it is respectfully submitted that plaintiffs' motion for a protective order should be denied in all respects.

/s/ Philip Le B. Douglas
Philip Le B. Douglas

Sworn to before
me this 12th day of
October, 1984

/s/ Edward F. Westfield
Notary Public

EDWARD F. WESTFIELD
Notary Public, State of New York
No. 03-4781170
Qualified in Bronx County
Commission Expires March 30, 1985

EXHIBIT 1

DECLARATION OF CAROL BREIDENBACH

1. My name is CAROL BREIDENBACH and I reside in Los Angeles County, California;

2. I work for the City of Los Angeles, Department of Airports, as an Airport Guide and am stationed in the satellite portion of Terminal Building No. 2 (the International Satellite) for eight hours a day, three days a week;

3. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness;

4. My duties require me to be present at an information desk in the satellite portion of Terminal Building No. 2 that is located near the Customs Area. I offer information and any necessary verbal assistance to air travelers, especially those foreign air travelers using Los Angeles International Airport;

5. I have been an Airport Guide for approximately three (3) years and during that time have had the opportunity to view the Hare Krishna solicitors operating in the satellite portion of Terminal Building No. 2. My desk is located within approximately 25 feet of the top of the escalators and close to the narrow corridors that lead to the Boarding Gates. The Hare Krishna solicitors typically operate very near the top of the escalators or in the narrowest part of the narrow corridors;

6. Typically, the Hare Krishna solicitors stand either directly in front of the up or down escalator in the satellite portion of the building or they line up across a narrow corridor that leads to the Boarding areas.

Recently, the Hare Krishna solicitors have, in addition to blocking the narrow corridor with their bodies, placed cartons of materials (i.e., books) and food containers in the narrow corridor so as to partially block access through this narrow corridor and obstruct members of the traveling public. I have seen several Hare Krishna members standing directly in front of the escalators coming into the satellite and stopping people directly in front of these escalators so as to block the exit of people from the escalator. Because of this blockage of the exit from the "up" escalator, people attempting to come up the escalator cannot easily exit the escalator and sometimes have to backstep on the escalator until the blockage cleared. Several people I recognize to be Hare Krishna solicitors are in the terminals almost every day passing out real or fake flowers, magazines or books, or little paper American flags;

7. In exchange for these articles, the Hare Krishna solicitors seek money;

8. I have never heard the Hare Krishna solicitors mention religion in the spiel they use to solicit funds;

9. I have seen many of the Hare Krishna solicitors wearing identification cards that state in bold dark letters "Student Teacher". I believe the identification card also has in much smaller and lighter print the letters I.S.K.C.O.N. at the bottom of the card. The portion of the card that states "Student Teacher" is visible from a distance of at least ten feet, whereas the letters I.S.K.C.O.N. are not particularly noticable because of the light and small print. Other than the letters I.S.K.C.O.N. there is no indication on this card that the solicitors are connected to

the Hare Krishna movement. I have hears numerous Hare Krishna solicitors state to people that they are student teachers and then ask for donations for "educational purposes". During these solicitations which I overheard, there was no mention of religion;

10. As mentioned earlier, the Hare Krishna solicitors often give out small paper American flags. They give these flags to many of the foreign travelers coming into Los Angeles International Airport. I have heard Hare Krishna solicitors, after giving out these little United States flags, state that this was "a greeting from the United States". Statements such as this to the foreign traveler seems to give them the impression that the solicitors are either airport or government employees here to greet them to the United States;

11. I have also seen a Hare Krishna solicitor state to a foreign traveler that the Hare Krishna solicitor was collecting for "an organization for children";

12. I have also seen Hare Krishna solicitors shortchange people who wish to donate a small amount. This shortchanging is particularly used against the foreign travelers that often do not appear to know the American monetary denominations or exchange rates. In addition, I have seen many Hare Krishna solicitors confuse, intimidate, and hassle people into giving more money than they originally indicated they wished to give. Typically, the confusing and intimidating solicitation technique takes the following form. A person who indicates that he would be willing to give $1.00 to the Hare Krishna solicitor or that he is not willing to make a donation but is willing to exchange a high denomination bill for the same

amount in smaller bills will be asked by the solicitor for a $20 or a $50 bill so that the solicitor may get rid of smaller bills in change or in exchange. If the person offers a larger bill, the Hare Krishna solicitor typically returns only a very small amount in change, again asking the person to donate the remainder. In order for the person to obtain the full amount of his change, he has to stand there, continuously refusing to donate more, and continuously demanding the full amount of his change. I have seen this approach used by Hare Krishna solicitors many times;

13. I have been told by a Hare Krishna solicitor by the name of "Rosi" that the Hare Krishna solicitors quit wearing their distinctive gowns "because people won't give any money if they know we are Hare Krishna". The Hare Krishna solicitor named "Rosi" reponded to my question "why don't you tell people your Hare Krishna", by stating that "if we told them, they wouldn't give";

14. People who refuse to give money to the Hare Krishna solicitors are often times called names by the solicitors in an apparent attempt to embarrass them and intimidate others into giving. Approximately 20 people per day complain to me about the Hare Krishna solicitation techniques;

15. After approximately one year of watching various Hare Krishna solicitors misrepresent themselves or their cause to people and after watching them take advantage of the foreign travelers, I put up a hand-made sign to the effect that "Hare Krishna devotees are soliciting in the Airport. You do not have to give them any money. Please save your money". I did this because I felt

that many unsuspecting people, especially the foreign travelers, had a right to know who they were giving money to and that they were not airport or government officials and further that they did not have to give any money to these people. I put up this sign without Department of Airports' permission and was later told that such signs were not permitted and that I had to take the sign down;

16. I have been threatened and intimidated several times by Hare Krishna devotees. I was first threatened on February 20, 1978, when a person I knew to be a Hare Krishna solicitor came up to me and said a Krishna member "is going to get you killed". Since that threat, a person I know to be a Hare Krishna member took my picture several times even though I indicated that I did not want him to take my picture. The man who took my picture has hung around the terminal watching me on several different days. Since the initial threat, I have been followed by Hare Krishna members and have been told by a Hare Krishna member "you're not going to be here much longer";

17. I am aware of other threats made by Hare Krishna members against airline personnel that have either made announcements that Hare Krishna members were in the terminals or intervened in disputes between passengers and Hare Krishna members. Because of the threats against me, because of the Western Airline employee battery, and because of the other threats that have occurred, I am fearful for my life. These threats have interfered with the ability to do my job and further has required me to change my parking place and seek escorts back and forth to the parking lot.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 30, 1978, at Los Angeles, California.

/s/ Carol Breidenbach
Carol Breidenbach

EXHIBIT 4

DECLARATION OF GLORIA CONKLIN

I, GLORIA CONKLIN, declare:

1. My name is GLORIA CONKLIN and my places of business are the Mutual of Omaha insurance counters in the Terminal Buildings at Los Angeles International Airport.

2. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness.

3. All of the events described below in paragraphs 4, 6 and 7 occurred in the Satellite portion of the Terminal Buildings at Los Angeles International Airport.

4. On Labor Day weekend, 1978, I observed a male person I recognized as a Hare Krishna member (this member and others had solicited and sold books near me in front of the escalators) approach a girl, approximately 13 years old, and repeatedly requested a donation. A middle-aged lady who was with the young girl and who identified herself as the young girl's mother, repeatedly informed the Hare Krishna member that they did not wish to make a donation and repeatedly asked the member to leave them alone. During this solicitation attempt, the mother and daughter backed up until they were forced up against the insurance counter. The young girl appeared scared and began crying and the mother requested me to call the police. After the mother repeatedly requested that the Hare Krishna member leave them alone, the mother slapped the Krishna member. The male Hare Krishna member then formed a fist and prepared to

strike the mother when a third party intervened to stop the blow.

5. Shortly after the incident described in paragraph 4 occurred, I spoke to a Hare Krishna member about their solicitation methods. After these confrontations, a male person I recognized as a Hare Krishna member followed me out of the Satellite, down the concourse, through the ticketing building, and into the parking structure to my car. Seeing the incident and physical altercation described in paragraph 4, plus the fact that I was followed to my car, made me afraid and apprehensive for my safety.

6. Within the last two months, I observed a person I recognized as a Hare Krishna member (this member distributed forms and Hare Krishna books with other Hare Krishna members) solicit funds from Hispanic people by representing that the money would go to the "Catholic Relief Mission."

7. Within the last two months, I observed another person I recognized as a Hare Krishna member (this member distributed flowers and Hare Krishna books and was working with other Hare Krishna members at the top of the escalators) approach a young man in a U.S. Navy uniform and request money stating that the Hare Krishna member was from "a society to bring the M.I.A.'s home from Viet Nam." I observed and overheard the Navy man state that he thought "this was a good cause" and he then endorsed his whole pay check to the Hare Krishna member.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on October 23, 1978, at Los Angeles, California.

/s/ Gloria Conklin
GLORIA CONKLIN

EXHIBIT 9

AFFIDAVIT
OF
VICTOR C. FERNANDEZ

1. My name is VICTOR C. FERNANDEZ and I reside in Pontiac, Michigan.

2. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness.

3. On September 7, 1978, at approximately 10:30 a.m., I was in a Terminal Building at Los Angeles International Airport on my way to catch an airplane.

4. At the end of the tunnel concourse I used an escalator to enter the satellite area.

5. As I stepped off the escalator, a young lady I believe to be a Hare Krishna devotee stepped in front of me and blocked my way. Although I tried to walk around her, she stopped me by pinning a small imitation flower on my lapel.

6. The devotee then asked for money stating that "we do it for the children". In response to this request, I offered to give her one ($1) dollar.

7. The devotee replied that the one ($1) dollar donation would be fine and then asked if I would give her a twenty ($20) dollar bill for nineteen ($19) dollars change. I gave her the twenty ($20) dollar bill. She then handed me a ten ($10) dollar bill and three (3) one ($1) dollar bills and then tried to hand me a book about the Hare Krishna group.

8. I politely refused the book and asked for the remainder of my change.

9. The devotee then became very beligerant stating that other people gave more than I and further that she had already given me back eighteen ($18) dollars in change. In response, I showed her the thirteen ($13) dollars she had given me and again requested the remainder of my change. The devotee then gave me two ($2) dollars more but refused to give me any more of my change. Finally, after more discussion and argument, made the devotee return the four ($4) dollars change due me.

10. The devotee did not have permission when she handled my clothing and I found this action offensive.

11. The devotee obtained money from me on false pretenses in that –

a. She stated that money was "for the children", and

b. She had no intention of returning my change to me.

12. The devotee obstructed my way and interfered with my travel.

Executed this 20 day of November, 1978, at Pontiac, Michigan.

County of Oakland

/s/ Victor C. Fernandez
VICTOR C. FERNANDEZ

SWORN TO, STATED UNDER OATH
AND SUBSCRIBED BEFORE ME THIS
20 day of November, 1978.

/s/ Richard C. Hohm
Notary Public

RICHARD C. HOHM
Notary Public, Oakland County, Michigan
My Commission Expires April 1, 1980

EXHIBIT 11

DECLARATION OF PIERRE DENARD

1. My name is PIERRE DENARD and I am the Station manager in charge of Air France's operations at Los Angeles International Airport.

2. I speak fluent French and English.

3. On Friday, September 15, 1978, I was on duty in Satellite 2, at the Los Angeles International Airport.

4. On the above date, a French Air Force airplane arrived at Satellite 2 and deplaned a group of mayors from the Polynesian Islands on their way to Paris, France, to meet with President Giscard d'Estaing. The mayors were accompanied by French Congressman Gaston Flosse.

5. Two mayors, who spoke only French exited the Customs area and were immediately grasped by two male members of the Hare Krishna organization who proceeded to pin miniature American flags on the mayors' coat lapels and then requested a donation.

6. Each of the two mayors gave the Hare Krishna members a five hundred (500) French Franc note (equivalent to approximately one hundred twenty United States dollars ($120). The two members expected and waited for change to be returned.

7. The two Hare Krishna members pocketed the money and departed, but the two mayors followed still expecting some change to be returned.

8. Mr. Flosse, the French Congressman, discovered the problem and at the request of the two mayors, asked the Hare Krishna members to return some of the money.

9. In response to this request, one of the Hare Krishna members told Mr. Flosse that he was nothing but a foreigner and that he had best keep his mouth shut because he had no right to interfere with their work. The Hare Krishna members finally agreed to return two hundred (200) Francs [approximately forty-eight ($48) dollars].

10. I was then asked to intervene and obtain a return of the money. I explained to the Hare Krishna members that the two French-speaking mayors did not speak English and did not understand what had happened. I further asked that the Hare Krishna members show me their identification cards. The Hare Krishna members were very rude to me and refused to return any more of the money or to identify themselves.

11. As Station Manager for Air France at Los Angeles International Airport, I receive many complaints, especially by foreign travelers, concerning the conduct of Hare Krishna members when they are soliciting money.

12. Many of the foreign travelers I have seen solicited by Hare Krishna members appear to be very confused by the Hare Krishnas' actions, and further, they appear to feel obligated to give the members money. This is especially true when the foreign traveler first enters this country and is presented with a small American flag in a large, obviously government-owned Airport.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of September 1978 at Los Angeles, California.

/s/ Pierre Denard
PIERRE DENARD
Declarant

EXHIBIT 16

DECLARATION OF PAUL MARKS

I, PAUL MARKS, declare:

1. My name is PAUL MARKS and I reside in Los Angeles County, California;

2. I work for Western Airlines as a Mechanic in Satellite Building 5 at Los Angeles International Airport;

3. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness;

4. At approximately 2:30 p.m. on December 23, 1977, I was in uniform with three fellow Western Airlines mechanics in the Satellite portion of Terminal Building No. 5 shortly before our shift started;

5. One of the mechanics that I was with made a practice of collecting unwanted Krishna books lying around in the terminals and reselling them to the Krishnas for a price of $1.00 per book. He approached a Hare Krishna female member and offered several books to her for $1.00 each. She offered to pay $.50 per book. My friend at this point started to rip one of the Hare Krishna books up;

6. Almost immediately, two men approached the four of us from each side. They began a verbal altercation with us by saying "you are messing with our people." Another said, "what are you doing with the book? If you want to fight, why don't you fight with us". We then informed these Hare Krishna members that we could not fight while on duty.

7. At this point we went back to our duty station on the operations level of Satellite 5. About two hours after the incident described in paragraph 6, I again entered Satellite 5 to get a pack of cigarettes. After I had purchased the cigarettes, I walked toward the elevator to go back to the operations level when the same two male Hare Krishna members approached me and started to again verbally harass me. One of the Hare Krishna members stated that he thought that I was a "faggot" and was also a " ___ asshole for tearing up the Krishna books";

8. I turned around to avoid an altercation and began to walk toward the elevator. A few feet closer to the elevator these two members again engaged in calling me profanities. I noticed that one of these Hare Krishna members had a raised object on his right hand that appeared to be brass knuckles. As I turned, again trying to walk away from these Hare Krishna members, the one wearing what appeared to me to be a set of brass knuckles, struck me with them on the left side of my face, close to my left eye. The blow sent me staggering several feet backwards into the Mutual of Omaha insurance counter, then into the wall, and finally I fell on the floor. As I tried to stand up, this same Hare Krishna member kicked me in the mouth, knocking three of my front bottom teeth through my upper lip. He then turned and ran down the escalators and through a side corridor to get away.

9. I was taken to the Western Airlines Ground Supervisor's Office by a fellow employee after this incident. I was then driven to Centinela Valley Hospital for emergency treatment. I was given 44 stitches on the inside of my mouth and 12 stitches on the outside of my

mouth to close these wounds. I had three teeth sticking through my lip on the way to the hospital. This caused me extreme pain;

9. A dentist was called to the hospital to wire these three teeth back into my lower gums. He has since informed me that he doubts that these three teeth will permanently remain in my lower gums due to the extent of these injuries.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 7 day of November, 1978, at Los Angeles, California.

/s/ Paul B.Marks
PAUL MARKS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,	:	DECLARATION OF BRIAN RUMBAUGH IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, AND EXHIBITS
Plaintiffs,	:	
-against-	:	
WALTER LEE, et al.,	:	75 Civ. 5388 (MJL)
Defendants	:	

Brian Rumbaugh declares under penalty of perjury as follows:

1. I have been an adherent of the Krishna consciousness religion for the past 15 years, and have been associated with the International Society for Krishna Consciousness, Inc. (hereinafter referred to as "New York Temple"), for this entire period. I am also known by the Sanskrit name Romapada Swami. The purpose of this declaration is to clarify for the Court the areas where New York Temple members are currently permitted to distribute literature and collect donations, and to define the specific areas to which they currently seek access.

2. During the 15 years in which I have been a devotee, I have served the New York Temple in a variety of capacities, including President from 1977 to 1978, and from 1982 to 1983. I was also *sankirtan* coordinator from

1980 to 1982, and am currently involved in the supervision of devotees throughout the New York area in preaching the Krishna consciousness religion and distributing religious literature to the general public. My duties, past and present, include *sankirtan* activities at the LaGuardia, Newark and John F. Kennedy Airports ("JFK"), both as *sankirtan* coordinator, and as a book distributor. I am thus intimately familiar with the layout and facilities at the three airports.

3. At present, New York Temple members are permitted to distribute religious literature and collect donations in certain areas at the three metropolitan airports. Those areas, which are designated on the attached exhibits, are as follows: (1) the second floor Central Terminal main lobby area at LaGuardia, designated 1-a in Exhibit 1, attached hereto; (2) the Central first floor lobby area of the north Terminal at Newark, designated 4-a in Exhibit 4, attached hereto; (3) the arrivals level lobby/mezzanine area of Terminal B at Newark, designated 6-a and 6-b respectively on Exhibit 6, attached hereto; and (4) the second floor lobby/mezzanine area of the International Arrivals Building ("IAB") at JFK, designated 8-a on Exhibit 8, attached hereto.

4. New York Temple members also have limited access to the Eastern Airlines Unit Terminal at JFK; the Eastern Airlines Shuttle Terminal at LaGuardia Airport, and; the Eastern Airlines departure lounge at LaGuardia.

5. New York Temple members seek further access, however, to the following specific areas from which they are presently excluded:

LaGuardia Airport: (1) the second floor Central Terminal finger areas designated 1-b on Exhibit 1, attached hereto; (2) the second floor Central terminal corridor areas designated 1-c on Exhibit 1; (3) the second floor Central Terminal West Wing lobby area designated 1-d on Exhibit 1; (4) the second floor Central Terminal departure and lobby areas designated 1-e on Exhibit 1; (5) the first floor Central Terminal Circulation areas designated 2-a, 2-b, and 2-c respectively on Exhibit 2, attached hereto; and (6) the first and second floor Delta Unit Terminal circulation areas designated 3-a and 3-b respectively in Exhibit 3, attached hereto.

Newark Airport: (1) The arrivals level circulation areas of Terminal A designated 5-a and 5-b respectively on Exhibit 5, attached hereto; (2) the departure level mezzanine/lobby and corridor areas of Terminal A designated 5-c and 5-d respectively on Exhibit 5; (3) the arrivals level circulation areas of Terminal B designated 6-a and 6-b respectively on Exhibit 6, attached hereto; and (4) the departure level mezzanine/lobby and corridor areas of Terminal B designated 6-c and 6-d respectively on Exhibit 6.

JFK Airport: (1) the first floor IAB arrivals lobby designated 7-a on Exhibit 7 attached hereto; (2) the second floor East and West Wing Building corridors and lobby areas designated 8-b, 8-c, 8-d, and 8-e respectively on Exhibit 8, attached hereto; and (3) various general circulation areas in the respective Unit Terminals designated in plain yellow on Exhibits 9-18 attached hereto.

6. It should be emphasized that New York Temple members do *not* seek to perform their activities in any private offices, ticket counters and lines, check-in areas,

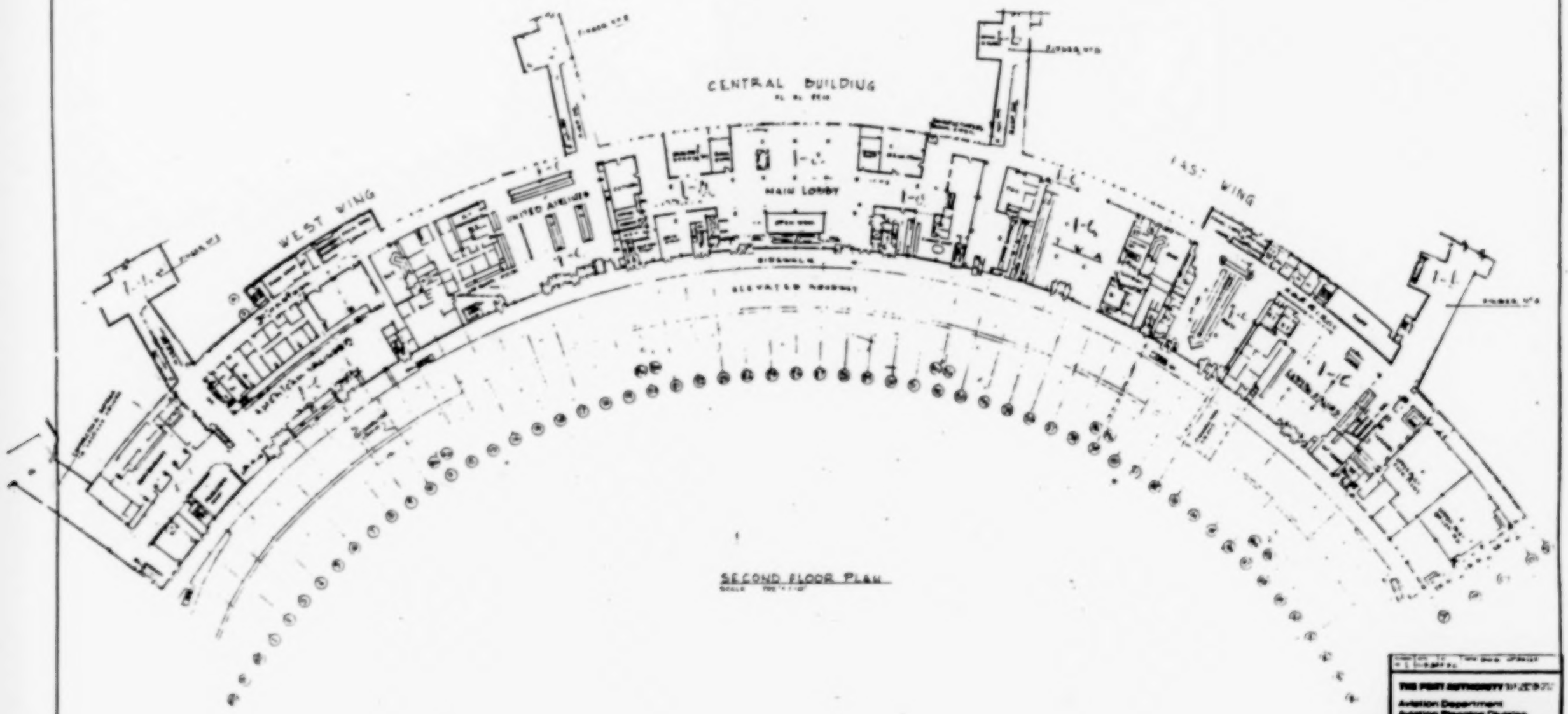
baggage claim areas or lines, or exclusively leased waiting areas which may be located in the areas described above. On the contrary, ISKCON members seek to conduct their activities *only* in areas of general circulation, including corridors, lobbies, and areas which are bordered by shops, restaurants, lounges and other commercial establishments unrelated to air transportation.

7. Based upon my years of personal involvement with the airports, the locations outlined above are analogous to metropolitan commercial areas, and are therefore suitable and appropriate for the performance of *sankirtan*.

Executed this 14th day of August, 1985, at New York City, New York.

/s/ Brian Rumbaugh
Brian Rumbaugh

EXHIBIT 1

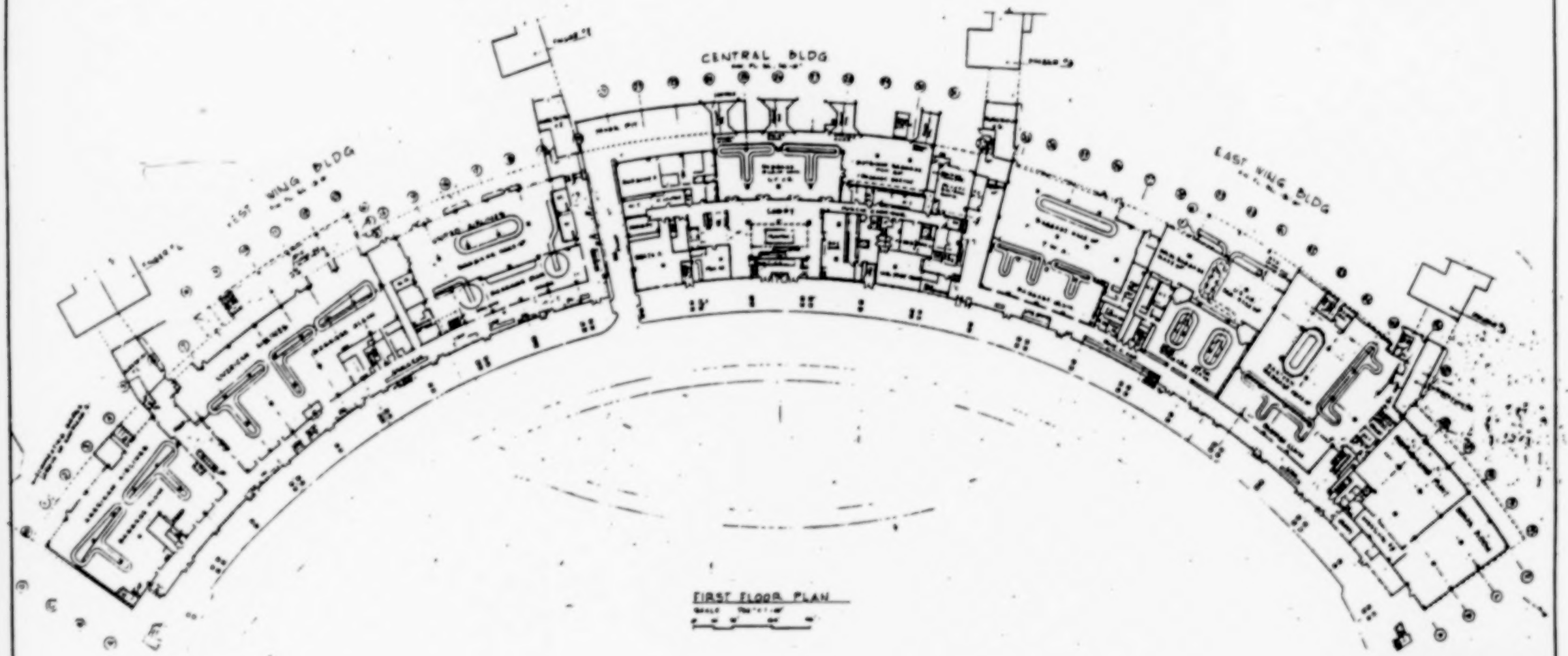


THE PORT AUTHORITY OF N.Y. & N.J.
Aviation Department
Aviation Planning Division

La Guardia Airport **LGA**

TERMINAL BUILDING
SECOND FLOOR PLAN

EXHIBIT 2



FIRST FLOOR PLAN

THE PORT AUTHORITY OF NY & NJ
Aviation Department
Aviation Planning Division

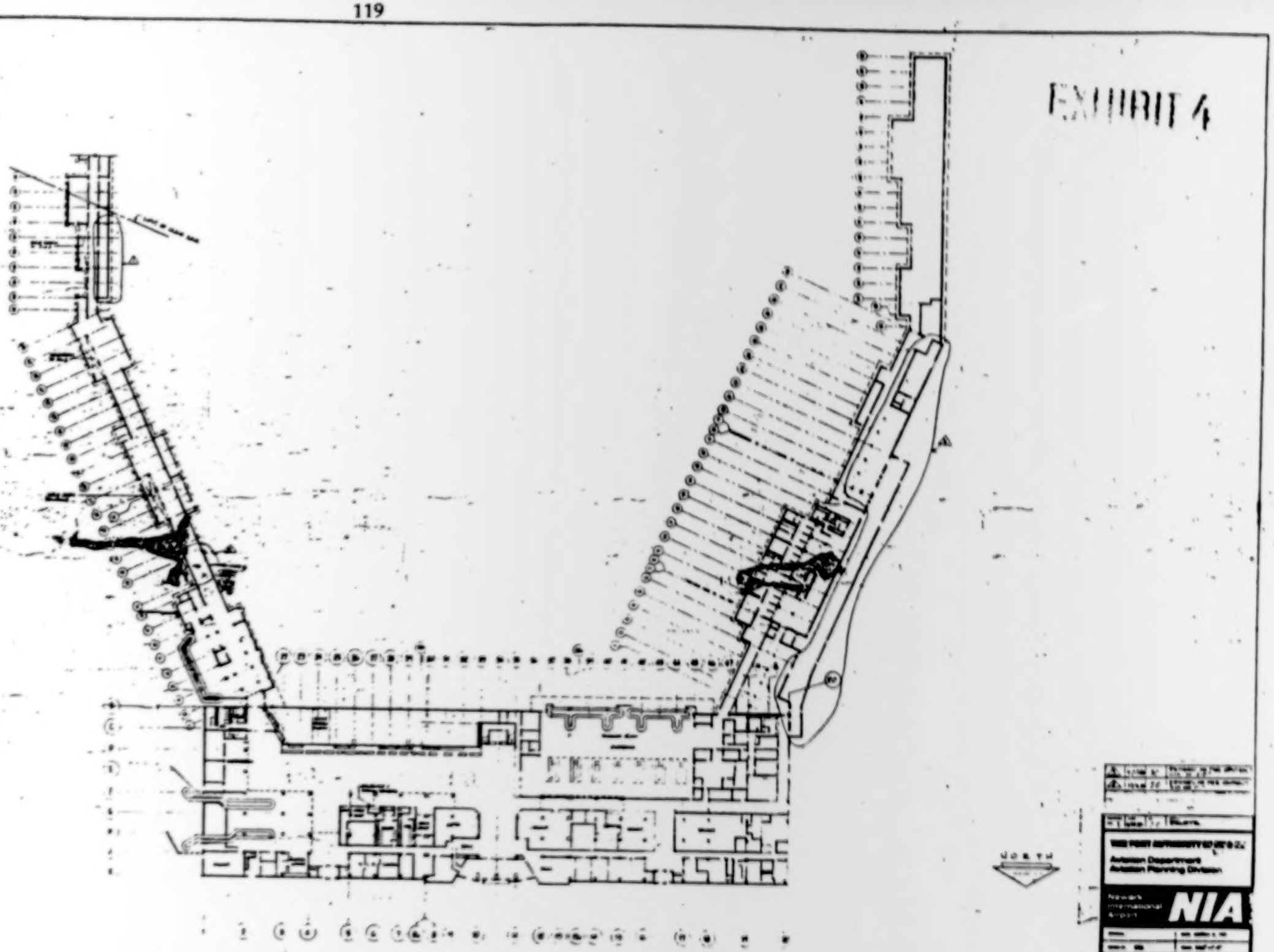
La Guardia Airport **LGA**

TERMINAL BUILDING
FIRST FLOOR PLAN

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

EXHIBIT 4

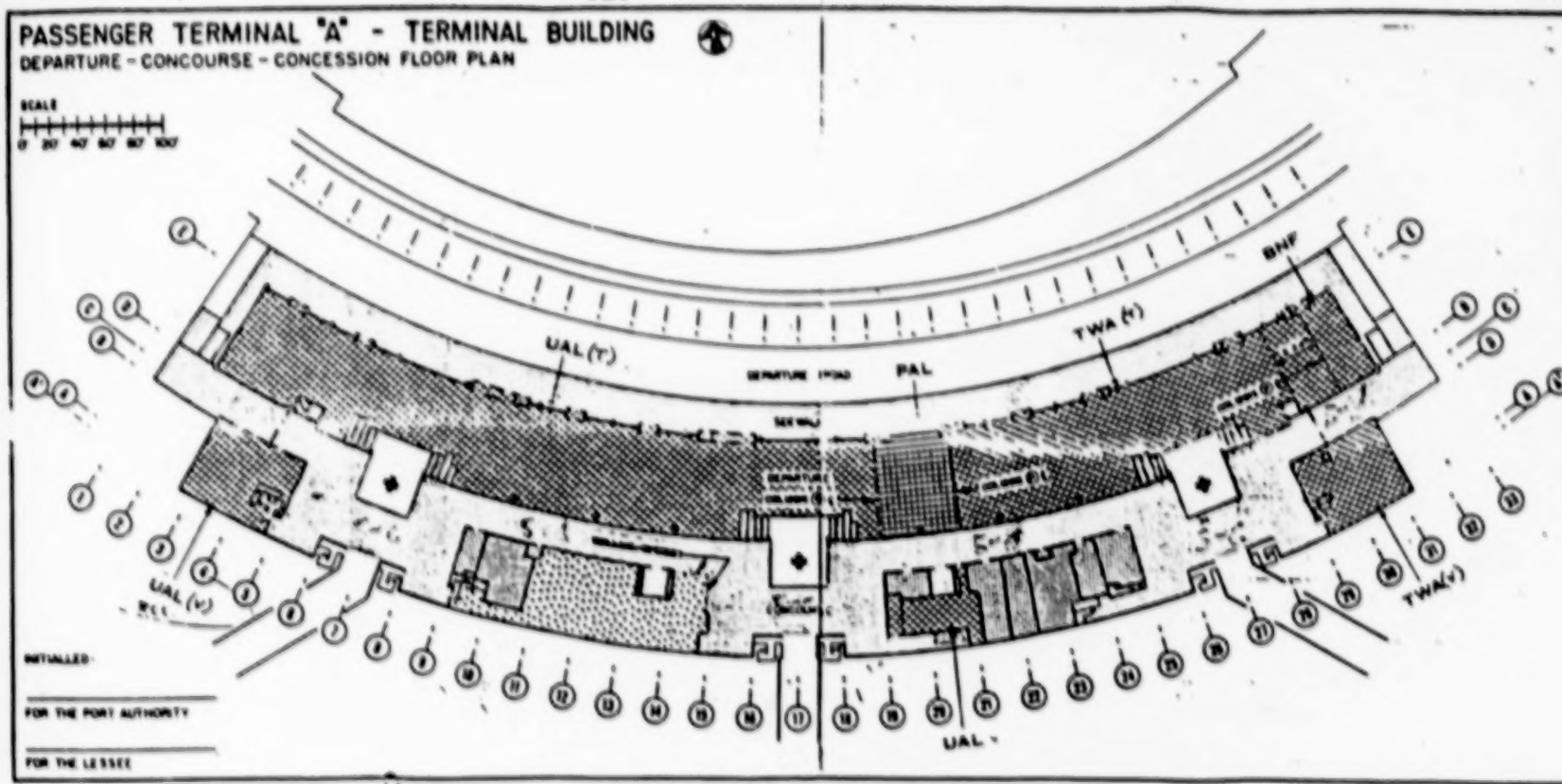


NORTH TERMINAL
FIRST FLOOR PLAN

EXHIBIT 5

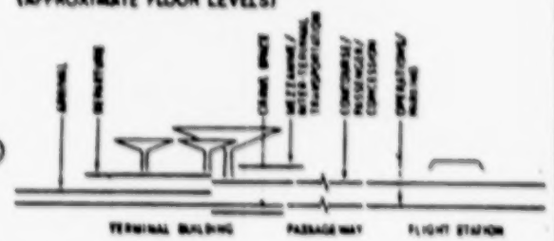
PASSENGER TERMINAL "A" - TERMINAL BUILDING

DEPARTURE - CONCOURSE - CONCESSION FLOOR PLAN



PASSENGER TERMINAL

PASSENGER TERMINAL "A" SECTION
(APPROXIMATE FLOOR LEVELS)



LEGEND: PATTERN "A"

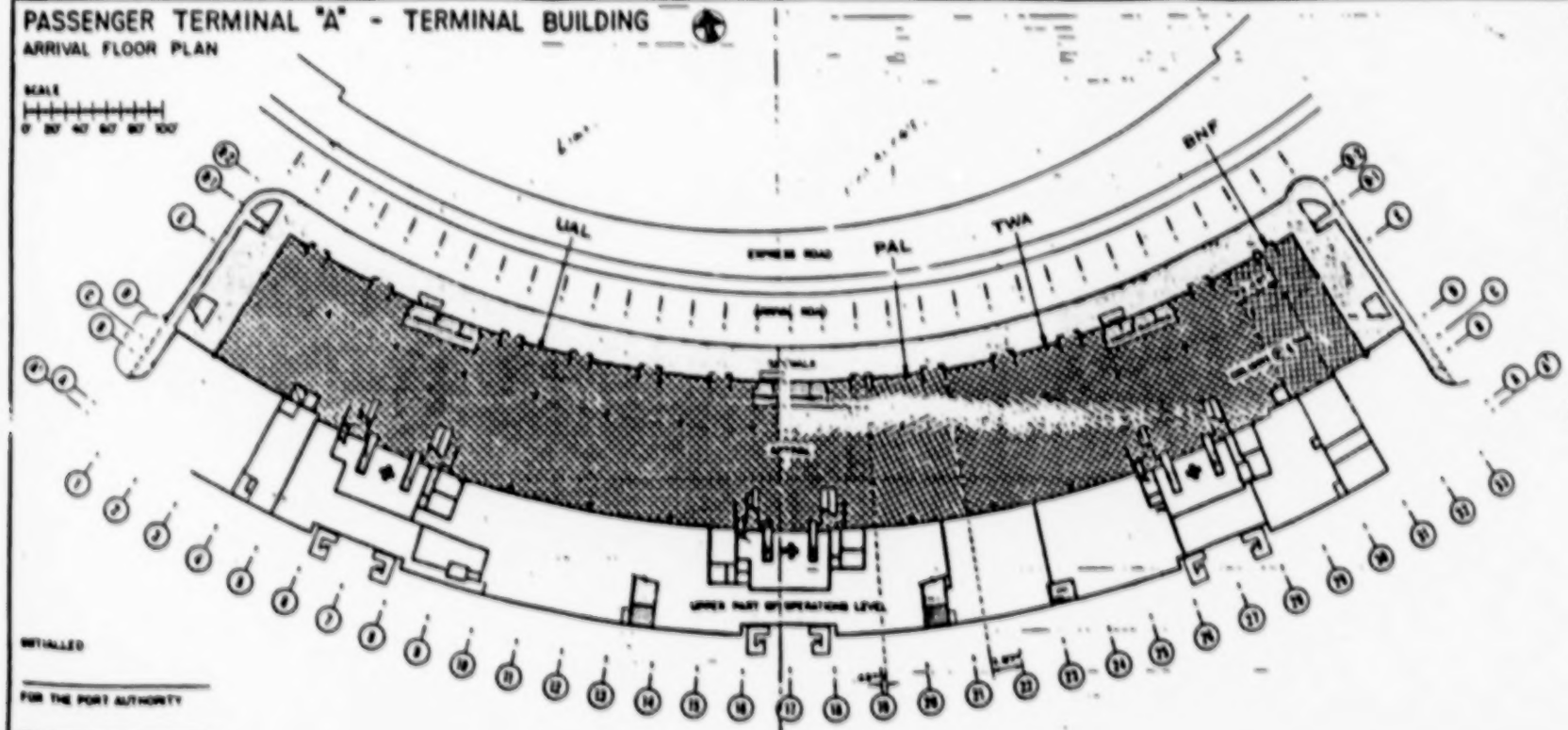
EXHIBIT A

THE PORT OF NEW YORK AUTHORITY
NEWARK AIRPORT

3-1-72 (A) NA72-25

PASSENGER TERMINAL "A" - TERMINAL BUILDING

ARRIVAL FLOOR PLAN



PASSENGER TERMINAL "A" KEY PLAN

PASSENGER TERMINAL "A" SECTION
(APPROXIMATE FLOOR LEVELS)

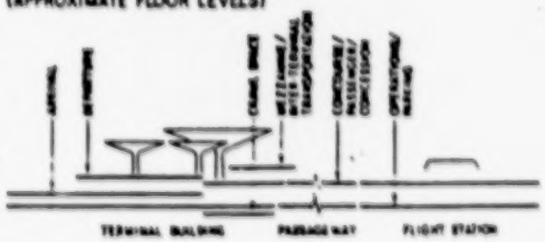


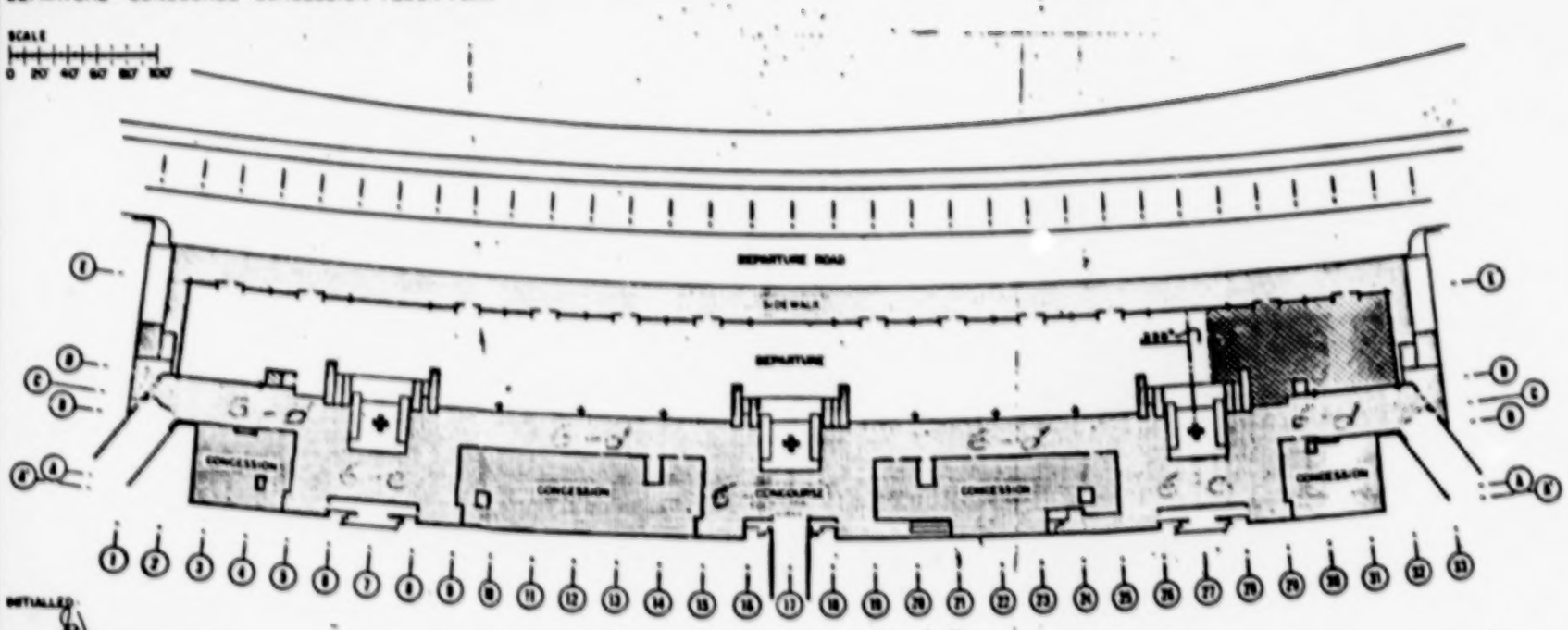
EXHIBIT A-1

THE PORT OF NEW YORK AUTHORITY
NEWARK AIRPORT

3-1-72 (A) NA72-26

PASSENGER TERMINAL "B" - TERMINAL BUILDING

DEPARTURE - CONCOURSE - CONCESSION FLOOR PLAN



PASSENGER TERMINAL "B" KEY PLAN

PASSENGER TERMINAL "B" SECTION
(APPROXIMATE FLOOR LEVELS)

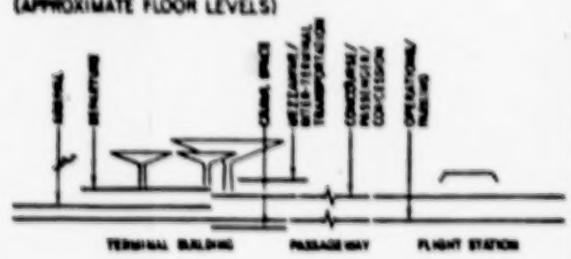
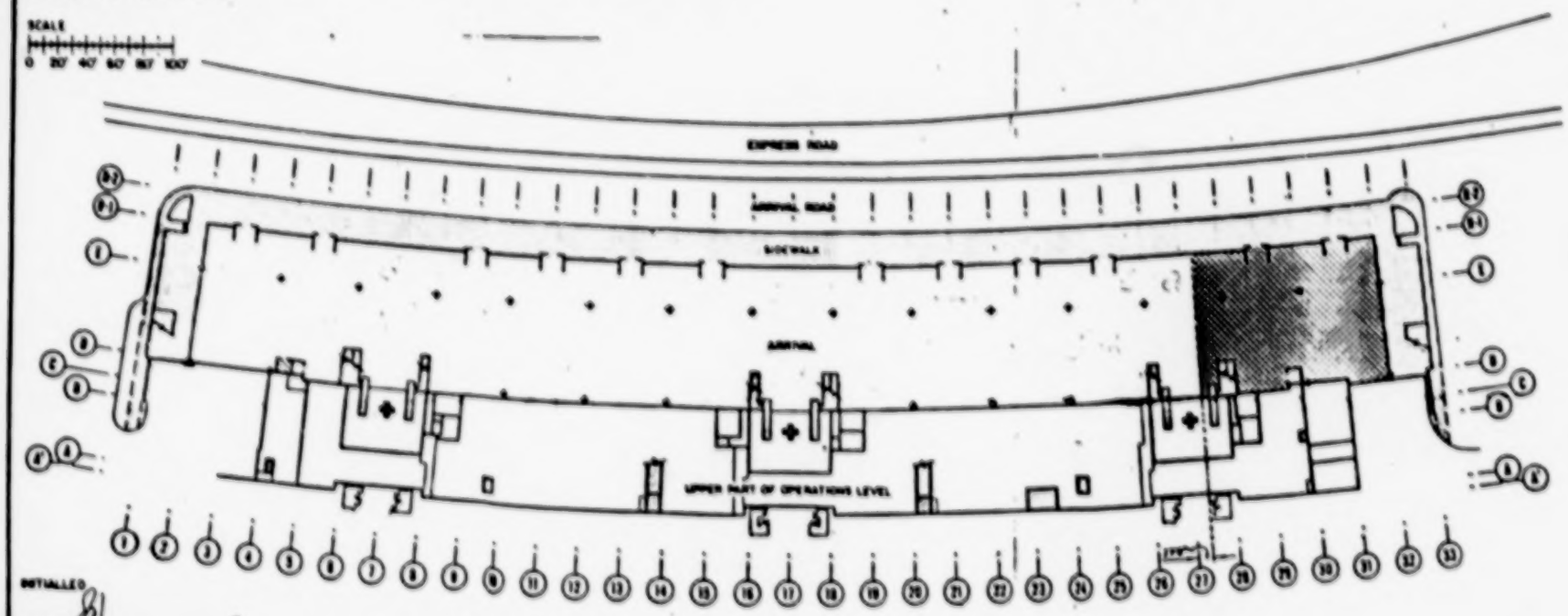


EXHIBIT A

THE PORT OF NEW YORK AUTHORITY
NEWARK AIRPORT

PASSENGER TERMINAL "B" - TERMINAL BUILDING

ARRIVAL FLOOR PLAN



PASSENGER TERMINAL "B" KEY PLAN

PASSENGER TERMINAL "B" SECTION
(APPROXIMATE FLOOR LEVELS)

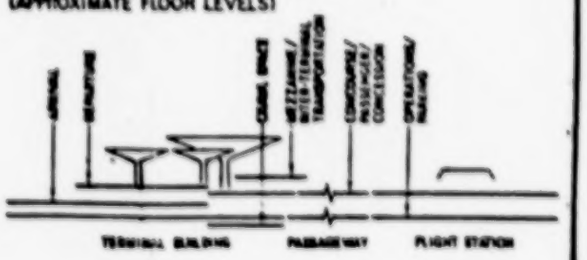


EXHIBIT A-1

THE PORT OF NEW YORK AUTHORITY
NEWARK AIRPORT

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SEE FOLDOUT NO 2-3

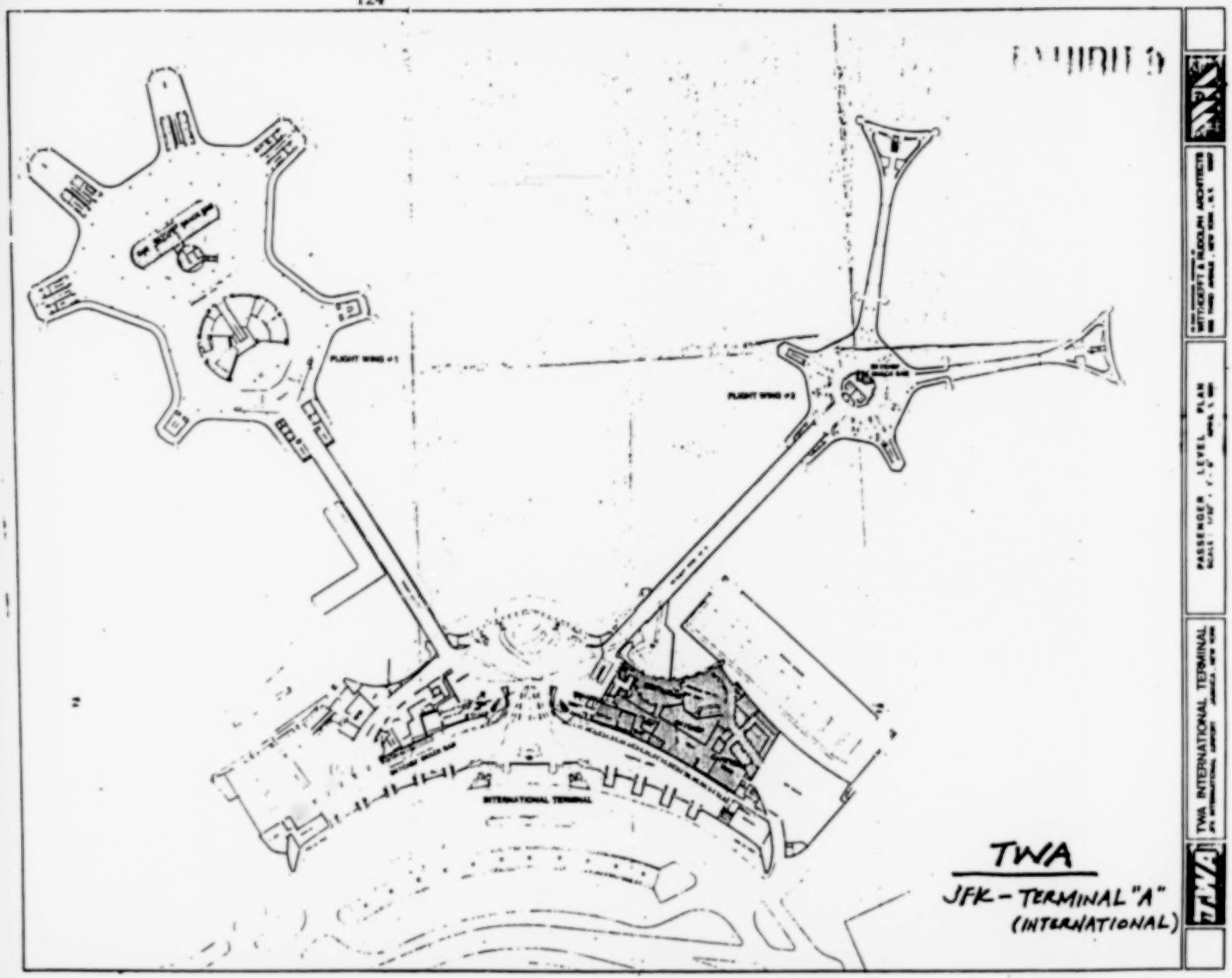
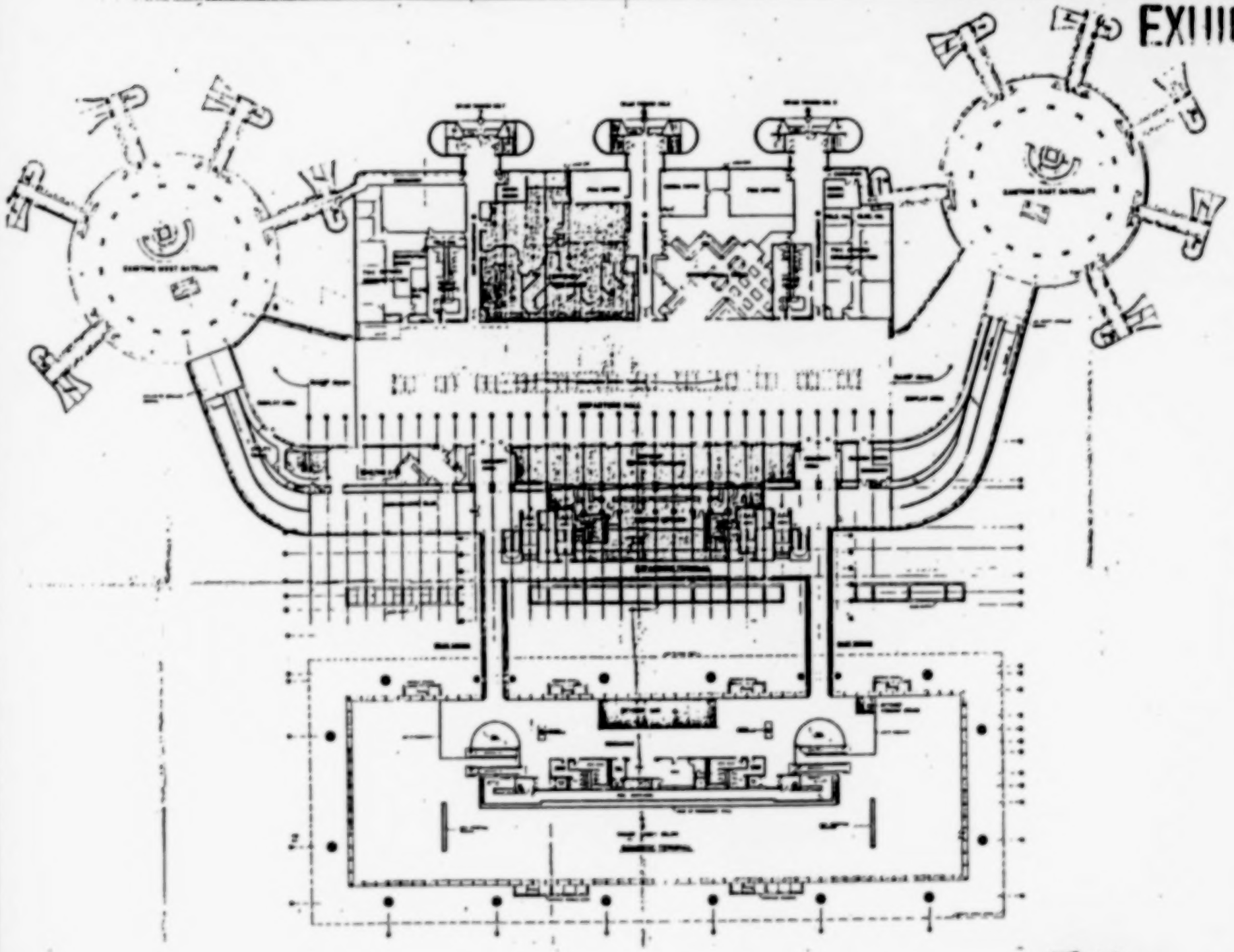


EXHIBIT 9
FLIGHT WING #1
FLIGHT WING #2
INTERNATIONAL TERMINAL
TWA
JFK - TERMINAL "A"
(INTERNATIONAL)
TWA INTERNATIONAL TERMINAL
PASSENGER LEVEL PLAN

EXHIBIT 10

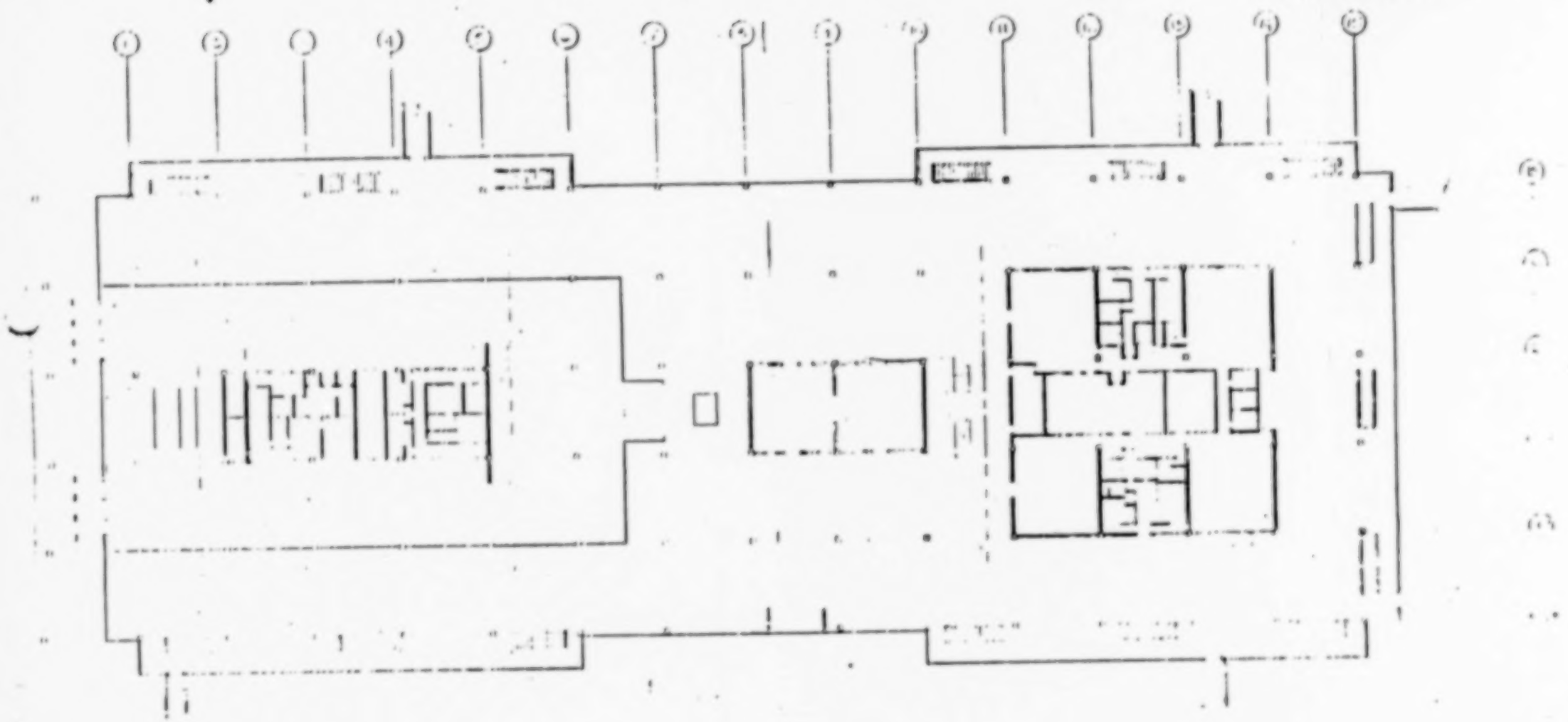


MEZZANINE LEVEL PLAN
TICKETING LOBBY

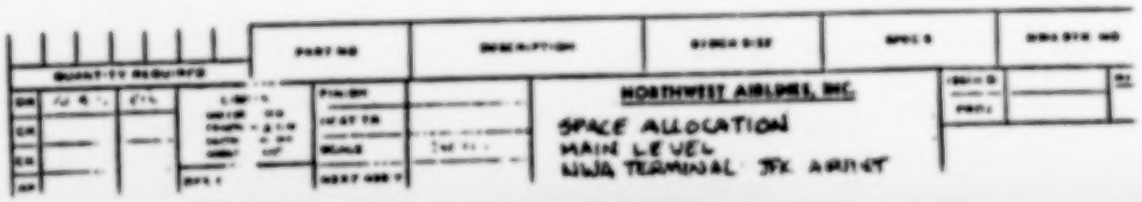
TWA
JFK — TERMINAL "8"
(DOMESTIC)

AB-3

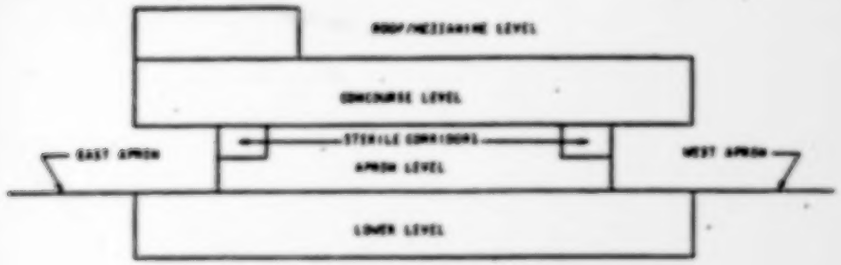
EXHIBIT 11



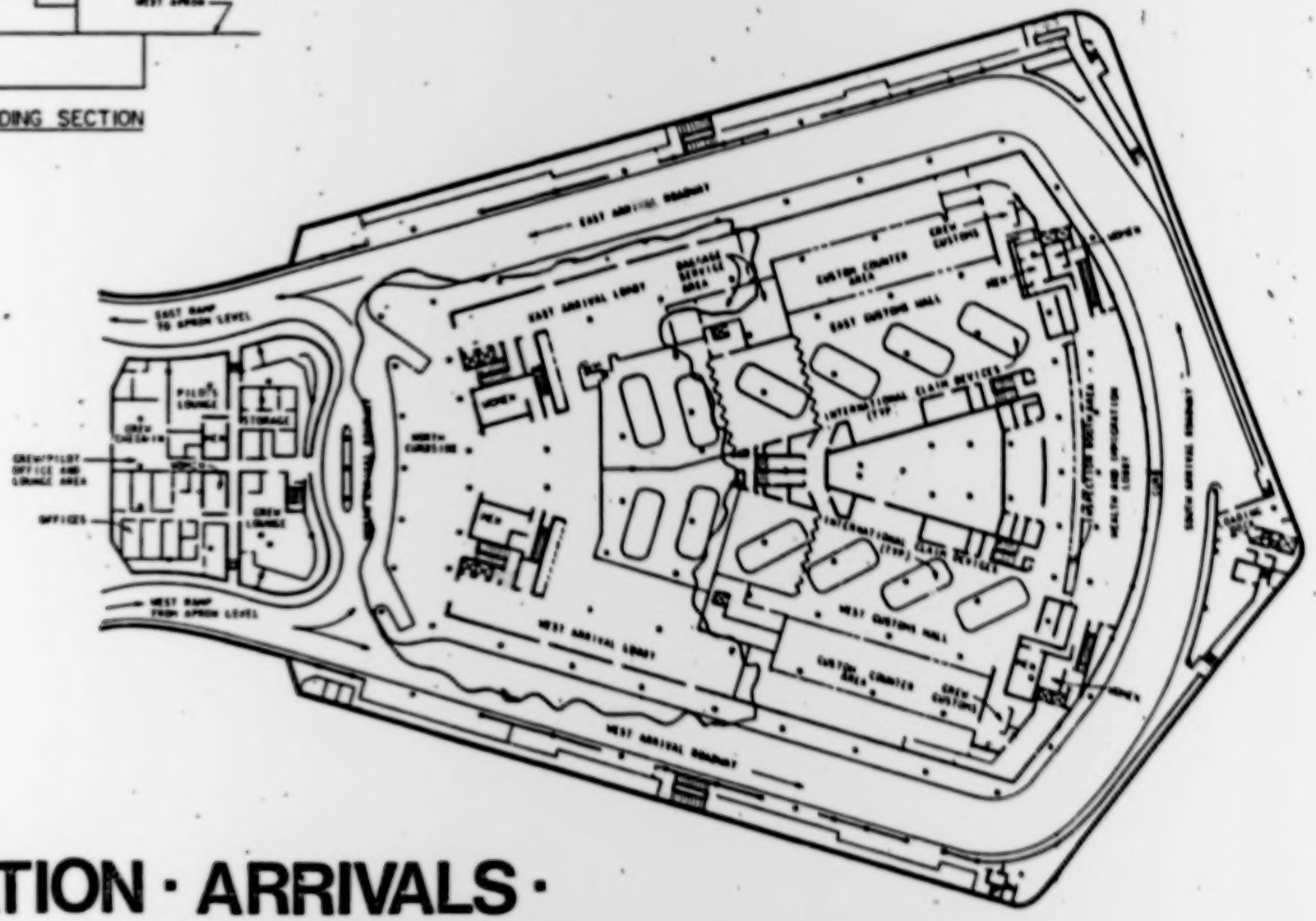
MAIN LEVEL PLAN.



EXISTING



PASSENGER TERMINAL BUILDING SECTION



TRANSPORTATION · ARRIVALS · IMMIGRATION & BAGGAGE PICK UP · LEVEL

8-10-70

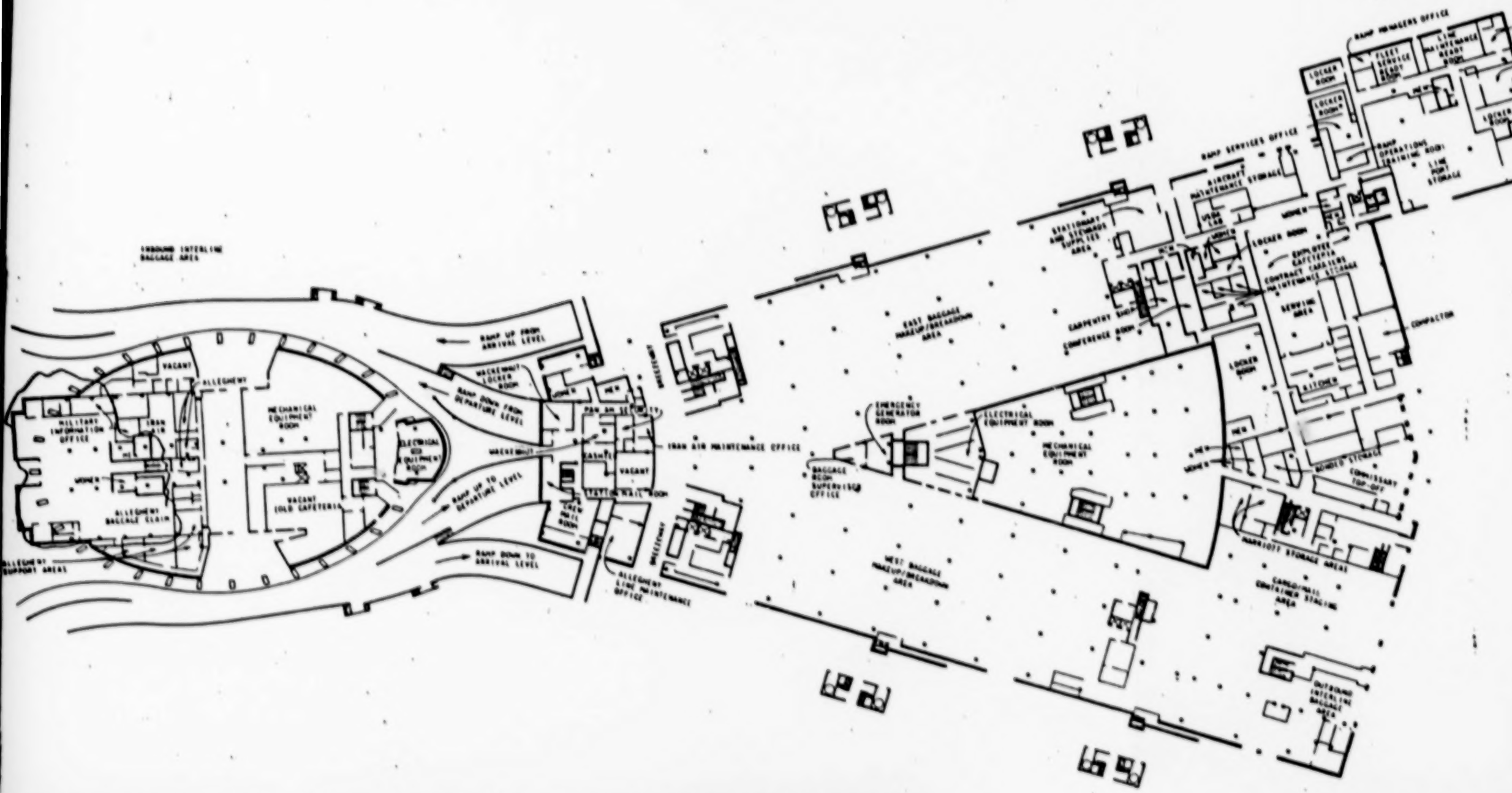
PAN AMERICAN WORLD AIRWAYS, INC.

J.F.K. TERMINAL STUDY

LEIBOWITZ/BODOUVA
AND ASSOCIATES
ARCHITECTS AND PLANNERS
70 WEST 40TH STREET
NEW YORK N.Y. 10018

2

Exhibit 13



BAGGAGE / GROUND MAINTENANCE

8-10-79

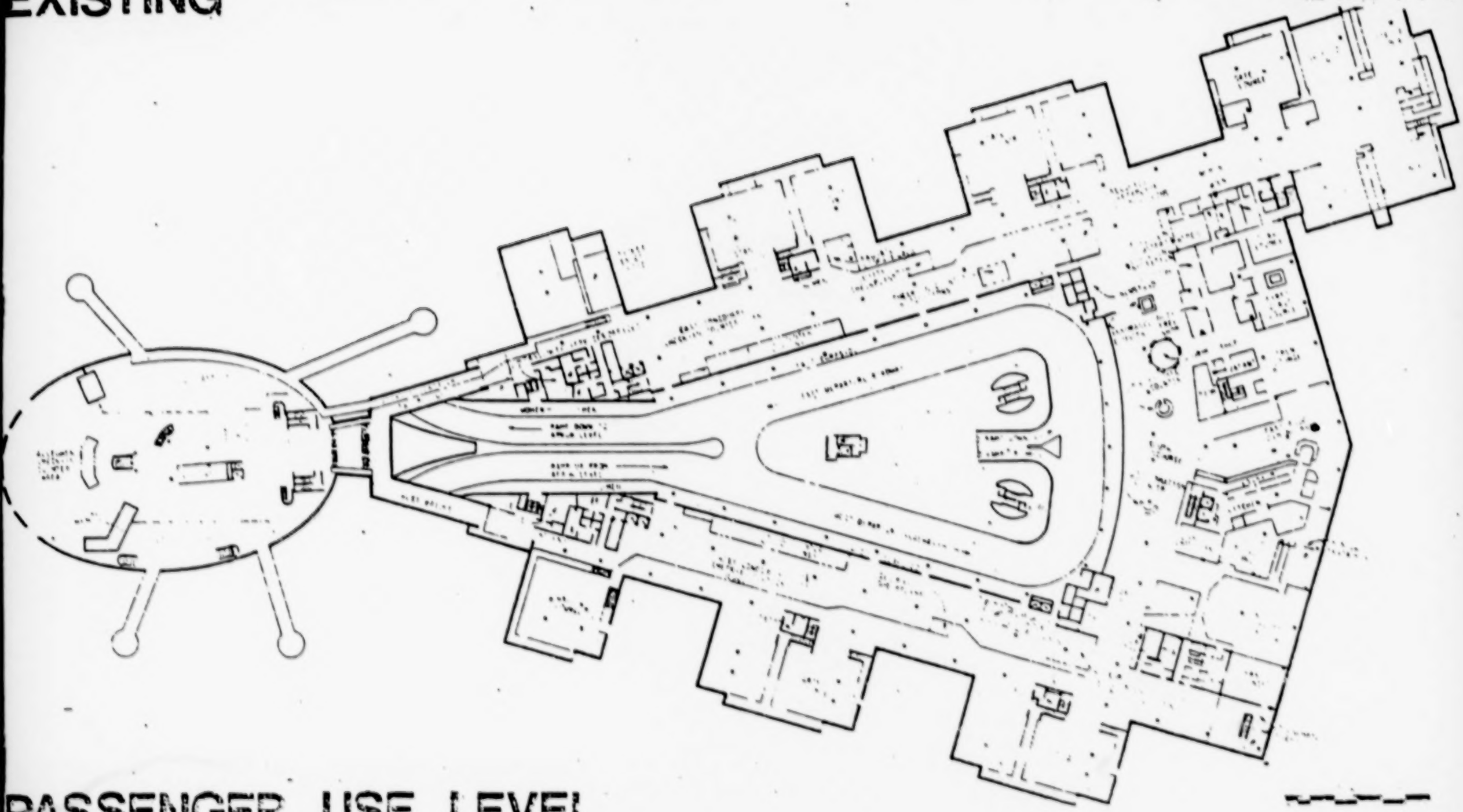
PAN AMERICAN WORLD AIRWAYS, INC.

J.F.K. TERMINAL STUDY

LEIBOWITZ/BODOUVA AND ASSOCIATES
ARCHITECTS AND PLANNERS
70 WEST 40TH STREET
NEW YORK N.Y. 10018

3

EXISTING

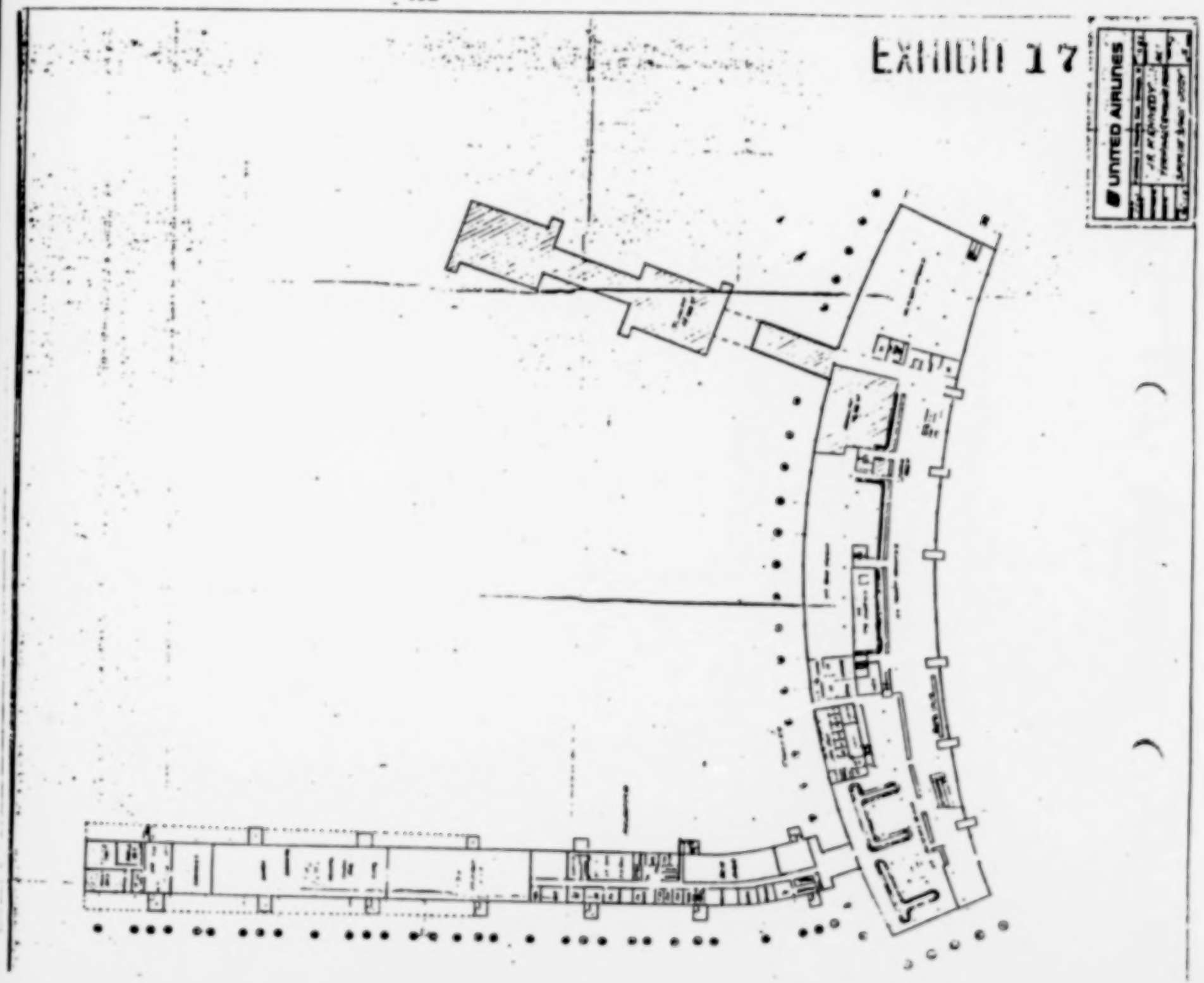


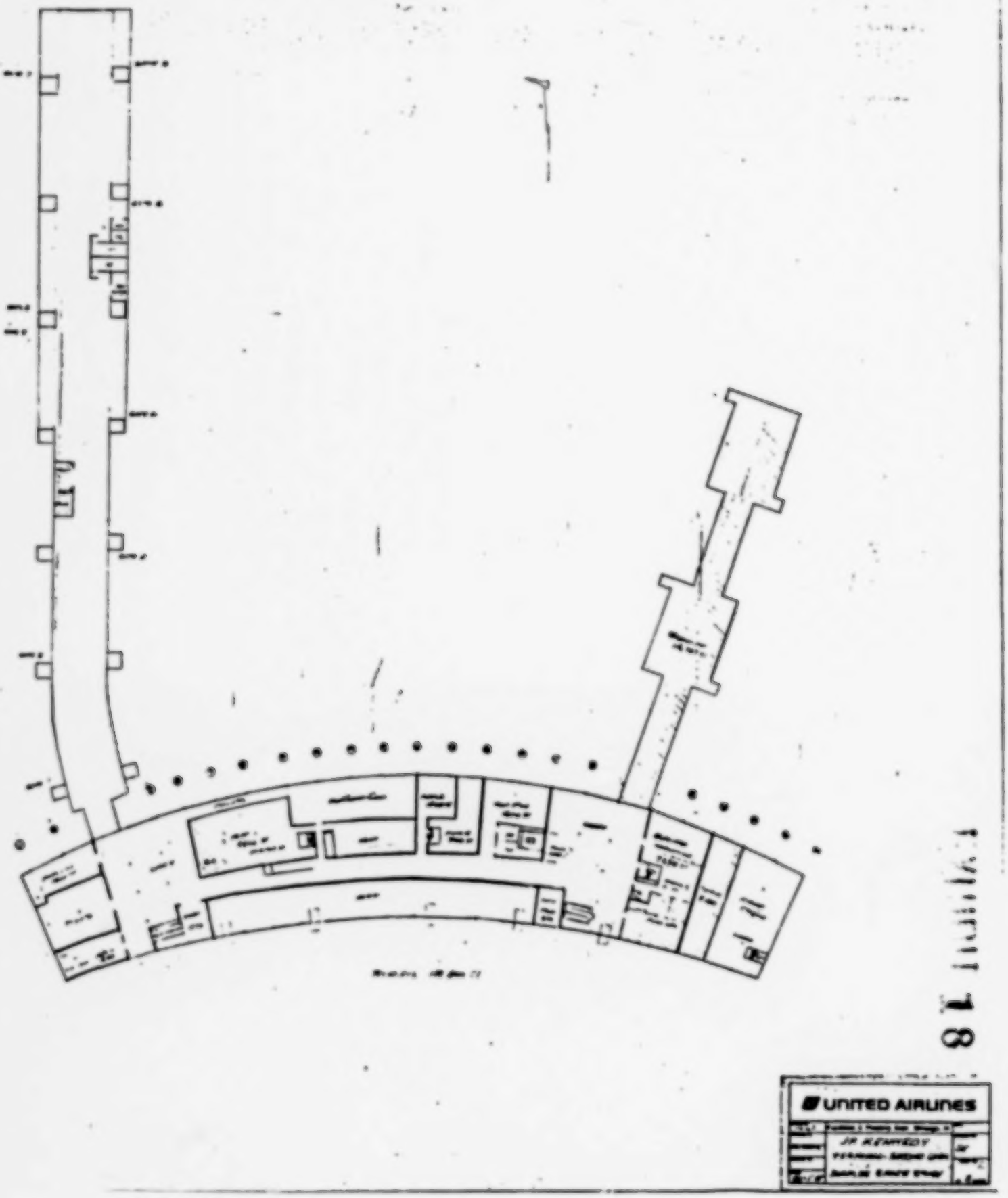
PASSENGER USE LEVEL

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 4-5

Exhibit 17




UNITED AIRLINES
JF KENNEDY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., Plaintiffs, -against- WALTER LEE, etc., et al., Defendants.	:	75 Civ. 5388 (MJL) NOTICE OF MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on December 21, 1987, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the Honorable Michael H. Dolinger, Magistrate, located at the United States Courthouse, Foley Square, New York, New York, plaintiffs International Society for Krishna Consciousness, Inc., a New York not-for-profit religious corporation, and Brian Rumbaugh, will move for an order that summary judgment be entered in their favor and against the defendants, (1) declaring that any and all rules, regulations, policies, and practices of the defendants, and each of them, that prohibit plaintiffs from distributing religious literature and soliciting religious contributions in certain public areas of the John F. Kennedy, LaGuardia, and Newark International Airports, are invalid under the first and fourteenth

amendments to the United States Constitution, and (2) permanently enjoining the defendants, and their agents, servants, and employees, and each of them, from enforcing any and all of such rules, regulations, policies and practices; or, in the alternative, for an order preliminarily enjoining the enforcement of any and all of such rules, regulations, policies, and practices during the pendency of this action. The motion will be based on the accompanying affidavit of Alan Attias, sworn to on November 9, 1987, Statement of Facts in Support of Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, or, in the Alternative, for Preliminary Injunction, and all prior proceedings, papers, and records herein.

Dated: Los Angeles, California
November 11, 1987

Respectfully submitted,

David Grosz
Robert C. Moest
Barry A. Fisher
Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, Calif. 90067
(213) 557-1077

David Mark Liberman
9806 Washington Boulevard
Culver City, Calif. 90232
(213) 204-0488

By: _____
David Grosz

Jeremiah S. Gutman
Eugene N. Harley
Levy, Gutman, Goldberg & Kaplan
275 Seventh Avenue, Suite 1776
New York, N.Y. 10001
(212) 807-9733

By: _____
Eugene N. Harley

Attorney for plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., plaintiffs, -against- WALTER LEE, etc., et al., defendants.	75 Civ. 5388 (MJL) STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In compliance with S.D.N.Y. Local Rule 3(g), plaintiffs submit the following statement of material facts as to which they contend that there is no genuine issue to be tried:

I. GENERAL FACTS

1. Plaintiff International Society for Krishna Consciousness, Inc. (hereinafter ISKCON, Inc.) is duly organized as a nonprofit religious corporation under the laws of the State of New York. Members of ISKCON Inc. espouse the religious and missionary views of Krishna consciousness, which teaches belief in the absolute supremacy of a single God or Deity (in Sanskrit, Krishna).

2. Plaintiff Brian Rumbaugh is a member and a Trustee of ISKCON, Inc. He has been a devotee of the Krishna consciousness religion for 17 years and was ordained as a "brahmin" or priest in 1971. The spiritual,

sanskrit name by which he is commonly known within the religion is Romapada Swami.

3. Krishna consciousness is a fundamentalist strain of Hinduism, and imposes upon its members a religious duty to perform a ritual known as *sankirtan*, which consists of going into public places, disseminating religious literature and soliciting funds to support the religion. *Sankirtan* is directed to spreading religious truth as it is known to Krishna consciousness, to attracting new members, and to supporting ISKCON Inc.'s religious activities. Donations, including those received for religious literature, not only defray printing and other distribution costs, but are the very lifeblood and principal means of support of this religious movement.

4. Defendant Superintendent is superintendent of the police employed by the Port Authority of New York and New Jersey (hereinafter Port or Port Authority).

5. Created in 1921, the Port Authority is a bi-state agency established by interstate compact between the States of New York and New Jersey. N.Y. Unconsol. Laws §§ 6401-6423 (McKinney 1979 & Supp. 1984-1985); N.J. Stat. Ann. §§ 32:1-1 to -24 (West 1963 & Supp. 1985). On behalf of the States of New York and New Jersey, the Port Authority is statutorily charged with power to "purchase, construct, lease and/or operate any terminal or transportation facility" within its jurisdiction, *id.* at § 6407; N.J. Stat. Ann. § 32:1-7, including John F. Kennedy (JFK), LaGuardia and Newark International (Newark) airports. The Port Authority operates the three airports for the benefit of the people of New York and New Jersey. *Id.* at § 6631; N.J. Stat. Ann. § 35.1.

6. Pursuant to the Port's statutory power, it has leased space at LaGuardia, JFK and Newark airports to numerous foreign and domestic airlines.

7. Defendants Air Canada, Air India, British Airways, Iberia Airlines of Spain, Icelandair, Irish International Airlines, Japan Air Lines, Scandinavian Airlines Systems, Sabena Belgium World Airlines, Varig Brazilian Airlines, Alitalia-Linee Aeree Italiane S.p.A., KLM Royal Dutch Airlines, Inc. and Luftansa German Airlines are foreign flag carriers which lease space from the Port Authority at JFK, which they use for private offices, ticket counters, passenger and baggage check-in areas, baggage claim areas, and passenger lounge/waiting areas. Affidavit of Maharaja Zutshi at ¶ 4; Affidavit of Jan Wildbergh at ¶ 3; Affidavit of Cesar Alcazar at ¶ 4; Affidavit of Thor A. Jorgensen at ¶ 4; Affidavit of P.G. Moore at ¶ 4; Affidavit of Yukio Ohtani at ¶ 4; Affidavit of Leif Anderson at ¶ 4; Affidavit of George Soliman at ¶ 4; Affidavit of R.V. Nelson Smith at ¶ 4; Affidavit of Ernesto Ricci at ¶ 3; Affidavit of Roel W. Haytink at ¶ 3;

8. Defendants American Airlines, Inc., Braniff, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc., Ozark Airlines, Pan American World Airways, Piedmont Airlines, Republic Airlines, Inc., Transworld Airlines, United Airlines, Inc. and USAir, Inc. are domestic flag carriers which lease space from the Port Authority at JFK, LaGuardia and Newark airports, which they use for private offices, ticket counters, passenger and baggage check-in areas, baggage claim areas, and passenger lounge/waiting areas. Affidavit of S.H. Dutton at ¶ 2; Affidavit of Richard H. Wesson at ¶ 2; Affidavit of R.J. Thorne at ¶ 2; Affidavit of Gregory H. Buhler at ¶ 2;

Affidavit of W.A. Blackmon at ¶ 2; Affidavit of Richard B. Pagen at ¶ 2; Affidavit of Charles W. Seaman at ¶ 2; Affidavit of Jerry L. Depoy at ¶ 2.

II. PUBLIC FORUM FACTS

A. General Facts.

9. The aviation industry in the New York/New Jersey area accounts for nearly 300,000 jobs, $6.2 billion in wages and salaries, $19 billion in overall economic activity, $600 million in regional taxes, and 3.5 percent of the gross regional product. Affidavit of Alan J. Attias In Support Of Motion For Summary Judgment, Ex. 7 at 1.

10. In 1986, JFK, LaGuardia and Newark served 78,846,000 passengers, representing 7.8 percent of the entire U.S. domestic market, and 54.4 percent of the Trans-Atlantic market. *Id.* Ex. 5 at 2. The three airports comprise the busiest and most heavily used metropolitan airport complex in the world. *Id.* Ex. 7 at 1. By the late 1990s, the number of passengers using the airports is expected to increase to more than 110 million. *Id.*

11. Also in 1986, the three airports employed 64,100 persons, with an estimated annual payroll of $2.1 billion. *Id.* Ex. 5 at 2.

12. JFK, LaGuardia and Newark airports are linked to the New York/Newark metropolitan area by a number of major thoroughfares, including the New Jersey Turnpike, the Staten Island Expressway, the Belt Parkway, the Van Wyck Expressway, Grand Central Parkway, the Cross Bronx Expressway, the Whitestone Expressway, and the Major Deegan Expressway. *Id.* Ex. 8 at 19.

B. Facts Pertinent to JFK.

13. The Port Authority has operated JFK under a lease with the City of New York since June 1, 1947. *Id.* Ex. 1 at 1.

14. Comprised of approximately 4,930 acres, (equivalent to all of Manhattan Island from 42nd Street to the Battery) and over 32 miles of roads, JFK is situated in the southeastern section of Queens County in Jamaica Bay, and is approximately 15 miles by highway from mid-Manhattan. *Id.*

15. In 1986, JFK served a total of 27,224,000 domestic and overseas travellers, and transported 1,096,000 tons of air cargo. *Id.* Ex. 5 at 3.

16. The JFK complex includes: (1) two pairs of parallel runways totalling nine miles in length; (2) the Air Cargo Center comprised of 23 cargo handling and cargo service buildings, two hangar/cargo buildings, an Animalport operated by the ASPCA, and a United States post Office Airport Mail Facility; (3) the Aircraft Service Area, comprised of 13 aircraft hangars, the Pan American engine overhaul buildings, a 32 million gallon aircraft fuel storage facility, and a fuel truck garage; (4) the Administrative area, which includes the Port Authority office and maintenance building, the Port Authority Police and Operation buildings, the Satellite Police Garage, a central telephone office, a medical building, and a water pumping station; and (5) variegated facilities such as the 520-room International Hotel, three rental car service buildings, the Carey Transportation bus garage, a federal office building, the Citibank building, seven food

production centers, and the Flying Tiger office building. *Id.* Ex. 1 at 1-2.

17. The JFK complex also includes the Central Terminal Area (CTA), consisting of eight free standing airline passenger terminals and the International Arrivals/Wing Building complex (IAB) in the center of airport. The terminals are surrounded by a dual ring of peripheral taxiways, and contain about 150 aircraft gate positions. The CTA also includes a 10-story airport control tower, a central heating and air conditioning plant, a tri-faith chapel plaza, parking for over 6,000 autos, and an auto service station. *Id.* Ex. 1 at 3.

18. The IAB is actually a complex of three connected buildings: the Arrivals building, the East wing building, and the West wing building. The first floor of the IAB complex consists of a central arrivals lobby area where people congregate to greet incoming passengers after they have cleared customs, which is also located on the first floor. The main floor lobby area is controlled and operated exclusively by the Port Authority, as is a mezzanine/lobby area located on the second floor. The second floor lobby area is bordered by two restaurants, two snack bars, a bar, a postal substation and postal facility, a bank, telegraph office, duty free boutique, drug store, nursery, barber shop, and two currency exchange facilities. The mezzanine/lobby area also includes a dental office and an area for the display of art exhibits. Attias Aff. at ¶ 15.

19. Space in the Wing buildings is leased by the Port Authority to the foreign flag carriers and numerous commercial establishments. The first floor East and West

wings are leased to and occupied by the foreign flag airlines, which they may use for reservations, ticket sales, accommodations for their passengers, baggage handling, and conducting operations, communications, reservations, and administration functions. Affidavit of Philip Le B. Douglas, executed June 14, 1985, at ¶ 3.

20. The foreign flag carriers also lease space on the second floor of the East and West wing buildings, which they may use for the same purposes, except for baggage handling. *Id.*

21. Additionally, the Port Authority leases space to numerous commercial establishments and patron facilities on the second floor, which border the long, expansive L-shaped corridors. In the East wing second floor, the corridors are bordered by six duty free shops, three bars, a snack bar, telegraph office, bank, currency exchange, bookstore, newsstand, India store, postal facility, cookie/candy shop, two travel insurance areas, and a retail Bloomingdale's. Attias Aff. at ¶ 16.

22. The East wing corridor also includes substantial seating facilities, as well as 11 free standing commercial advertising displays, and two freestanding public service advertising displays. *Id.*

23. The configuration of the West wing corridor is a mirror of the East wing, and is bordered by four duty free shops, a newsstand, bookstore, currency exchange, snack bar, cookie/candy shop, a cash/traveller's check machine, two bars and two travel insurance facilities. The corridor also provides for ample seating areas, as well as 11 free standing commercial advertising displays, and

one free standing public service advertising display. *Id.* at § 17.

24. The eight unit terminals are leased from the Port Authority by seven domestic air carriers – Pan American, Northwest (including Delta), Eastern, United, American, British Airways and TWA (domestic and international).

25. The Pan American unit terminal consists of three levels: (1) the immigration and baggage pick up level, (2) the passenger use level, and (3) the baggage ground maintenance level. The terminal structure consists of a large oval building which leads into a triangular shaped building protruding outward from the oval. *See* Buhler Aff. Ex. 1.

26. The oval shaped building has two levels. The first level contains a general ticketing and baggage check-in area, as well as a newsstand, gift shop and postal facility. The second level consists of a snack bar and cocktail lounge. Attias Aff. at ¶ 18.

27. Two long corridors contain six aircraft gate positions and lead to a rear corridor, which contains a passenger seating area. Numerous commercial establishments and patron facilities are located in the rear corridor, including two duty free shops, two currency exchanges, a travel insurance facility, drug store, cocktail lounge, cafeteria, toy shop, bookshop, gourmet food shop, newsstand, restaurant, beauty shop, bank, and retail Bloomingdale's. The corridor walls are lined with commercial advertising billboards, and six rotating commercial advertising displays and one rotating public service advertising display are located in the floor areas. *Id.* at ¶ 19.

28. The Immigration and Baggage Pickup level includes car rental and hotel reservation counters, an American Express machine and commercial advertising displays. *Id.* at ¶ 20.

29. The Northwest/Delta unit terminal is a rectangular shaped building with an Inbound level, Outbound level, and mezzanine level. Thorne Aff. Ex. 1. The front portion of the outbound level is comprised of ticketing and baggage check-in areas. Three main corridors lead to a rear corridor/hallway, and are bordered by a large duty free shop in the central concourse area, a restaurant, cocktail lounge, currency exchange, travel insurance facility, traveler's check machine, and postal facility. Passenger seating facilities and six commercial advertising stands are located in various places in the outbound level. *Id.* at ¶ 21.

30. The inbound level consists of the baggage retrieval area, and a lobby area bordered by car rental and hotel reservations counters. *Id.* at ¶ 22.

31. The Eastern unit terminal is a compact rectangular building with two concourses extending behind the building from both sides. The central terminal area consists of a ticketing and baggage check-in area, a spacious seating area, and a series of commercial shops situated in kiosks in the middle of the terminal. *Id.* at ¶ 23.

32. A central hallway leads to a rear corridor which runs parallel to the front of the building. The rear corridor leads into the two concourses at both ends, and is bordered by two giftshops, a drugstore, coffee shop, postal facility, newsstand, cutlery shop, restaurant/

lounge, cookie shop, barber shop, shoeshine stand, and two duty free shops. *Id.* at ¶ 24.

33. The Eastern unit terminal also contains an arrivals level where passengers retrieve their luggage. Located on this level are standard rental car and hotel reservation counters. Interspersed through the arrivals level, as well as the central main floor lobby area, are numerous free standing advertising displays. *Id.* at ¶ 25.

34. The United unit terminal is a two-level curved rectangular structure with two concourses extending from the rear of the building. Seaman Aff. Ex. 1. The ticket and baggage check-in area is located in the central portion of the departure level. On each side of the ticketing counters are spacious lobby areas, and to the rear is a long corridor which connects the two lobbies. Located within the lobby/corridor area are two currency exchanges, two gift shops, two newsstands, three cocktail lounges, a duty free shop, restaurant, coffee shop, bank, postal facility, shoeshine stand, travel insurance facility, and traveller's check/cash machine. Also interspersed around the lobby area are seating facilities and five rotating advertising displays, as well as a motor vehicle exhibit. Attias Aff. at ¶ 26.

35. Located on the ground level of the United terminal is the baggage retrieval area, and car rental and hotel reservation counters. Numerous advertisements line the walls as well. *Id.* at ¶ 27.

36. The American Airlines unit terminal is a two level structure with two concourses extending from the rear of the building. The main departure level contains a ticketing/baggage check-in area, seating areas and

numerous commercial establishments and patron facilities, including a bank, two restaurants, two snack counters, two gift shops, two traveler's check/cash machines, a currency exchange, duty free shop, cocktail lounge, newsstand and shoeshine stand. A duty free shop is also located on a small mezzanine above the main floor. *Id.* at ¶ 28.

37. The ground floor arrivals level contains seven baggage retrieval areas, with advertising displays interspersed throughout the area. Car rental and hotel reservation counters are also located on this level. *Id.* at ¶ 29.

38. Each of the main floor gate areas are also served by two cocktail lounges and two snack bars. *Id.* at ¶ 30.

39. The front portion of the British Airways unit terminal outbound level provides for ticketing and baggage check-in. A back corridor of the outbound level borders the gate positions, and consists of a large seating area which extends the length of the corridor. The corridor is bordered by two cocktail lounges, a barber shop, nursery, gift shop, duty free shop, newsstand, cookie/candy store, cafeteria, postal facility, travel insurance area, and a currency exchange. A small mezzanine level also has a lounge area. *Id.* at ¶ 31.

40. The British Airways inbound level contains the baggage retrieval area and car rental and hotel reservation counters. *Id.* at ¶ 32.

41. TWA maintains two unit terminals. Terminal B serves primarily domestic flights, Pagen Aff. at ¶ 2, and is a multi-leveled configuration. *Id.* Ex. 1. The main level contains a central ticketing and baggage check-in area.

Located behind the ticketing area is a mezzanine level which includes two duty free boutiques, a cocktail lounge, currency exchange, travel insurance facility, and four rotating advertising displays. Attias Aff. at ¶ 33.

42. From the mezzanine level, two corridors lead to a large departure hall, which contains a restaurant, cafeteria, snack bar, duty free shop, gift shop, newsstand, two nurseries, and a seating area. Extending outward from the departure hall are two concourses, each of which contains one cocktail lounge. *Id.* at ¶ 34.

43. The arrivals level of Terminal 8 includes a baggage retrieval area, as well as car rental and hotel reservation counters, a cash machine and a traveller's check machine. *Id.* at ¶ 35.

44. TWA Unit Terminal A serves primarily international flights, Pagen Aff. at ¶ 2, and is also a multi-leveled configuration. *Id.* Ex. 2. The front portion of the departure level is occupied by the ticketing and baggage check-in area, adjacent to which is a sunken seating/waiting area bordered by two mezzanines. Located on the mezzanines are two currency exchanges, two duty free shops, two postal facilities, a book store, nursery, snack bar, two cocktail lounges, a restaurant, newsstand, shoeshine stand, coffee shop, and bank. Attias Aff. at ¶ 36. A bar and snack bar are located in flight wing no. 1, and a snack bar is located in flight wing no. 2. *Id.* at ¶ 37.

45. The arrivals level of Terminal B includes a baggage retrieval area, rental car and hotel reservation counters, a currency exchange, travel insurance booth, and an American Express vending machine. *Id.* at ¶ 39.

C. Facts Pertinent to LaGuardia.

46. The Port Authority has operated LaGuardia Airport under a lease with the City of New York since 1947. Attias Aff. Ex. 2 at 1.

47. The airport consists of 650 acres, and is located in the Borough of Queens, bordering on Flushing and Bowery Bays, about eight miles from mid-Manhattan. *Id.*

48. In 1986, LaGuardia served 22,189,000 domestic and overseas passengers. *Id.* Ex. 5 at 3.

49. The airport complex includes two 7,000 foot runways, a fuel storage facility with a total capacity of 5,130,000 gallons, nine aircraft hangers, a police building, a mail facility, an air cargo facility, garaging, maintenance, and food preparation buildings, and marine and aircraft simulation equipment. *Id.* Ex. 2 at 3.

50. The Central Terminal Building (CTB) is currently 1,300 feet long and 125 feet wide, and contains 650,000 square feet of floor space. It is the equivalent of six city blocks, and consists of a four-story central section, two three-story wings, and four two-story arc fingers leading to 36 aircraft gate positions. *Id.* at 1-2.

51. The second floor of the CTB is the main departure level which consists of a spacious central lobby area, and East and West wings. A smaller lobby area is located at the end of the West wing. Attias Aff. at ¶ 40.

52. Five ticketing and baggage check-in areas are located on the second floor – two between Fingers 1 and 2, and three between Fingers 3 and 4. A rear corridor runs

the entire length of the East and West wings, and intersects with the central lobby area. Located along the corridor and lobby areas between Fingers 1 and 2 are a bookstore, cocktail lounge, postal facility, shoeshine stand, and a traveler's check/cash machine. Three gift shops, a book store, newsstand, drug store, barber shop, restaurant, bank, coffee shop, postal facility, and a traveler's check/cash machine are located between Fingers 2 and 3. And a cocktail lounge, shoeshine stand, gift shop, and restaurant are located between Fingers 3 and 4. Commercial and public service billboard advertisements line the walls between the fingers and a traveller's check/cash machine, postal facility, motor vehicle display, two rotating commercial advertising displays, and a manned AIDS information table are located in the central lobby area. *Id.* at ¶ 41.

53. Located at the end of each of the four fingers are a newsstand, postal facility, currency exchange, restaurant, fruit and nut stand, duty free shop, and travel insurance facility. *Id.* at ¶ 42.

54. The first floor arrivals level of the CTB consists of seven baggage retrieval areas linked by a corridor extending the length of the East and West wings. A small lobby is located in the central area. *Id.* at ¶ 43.

55. Several car rental and hotel reservation counters, a bank, post office substation, nursery, and numerous commercial advertisements are also located on the arrivals level. *Id.*

56. The third floor of the CTB includes a long corridor extending the length of the building. Two corridor/lobby areas link the East and West wings to the main

parking structure located directly in front of the CTB. Private airline clubs, a restaurant and chapel are located on this level. *Id.* at ¶ 44.

57. In addition to the CTB, Eastern and Delta airlines maintain unit terminals at LaGuardia, which are located east of the CTB. The Eastern Commuter Terminal is a one level structure with a ticketing area, cafeteria, cocktail lounge, gift shop and newsstand. *Id.* at ¶ 45.

58. The Eastern Shuttle Terminal consists of a departure and arrivals level. In addition to the ticketing and baggage check-in area, the departure level includes a gift shop, snack bar, cafeteria, cocktail lounge, travel insurance facility, traveler's check/cash machine, and shoeshine stand. The arrivals level includes a baggage retrieval area, newsstand, cash machine, snack bar, and car rental and hotel reservation counters. *Id.* at ¶ 46.

59. The Delta/Northwest unit terminal is a two-level L-shaped structure. The ticketing and baggage check-in areas are located in the front portion of the main departure level. A corridor leads to a central lobby and rear corridor, where numerous commercial establishments and patron facilities are located, including two restaurants, two gift shops, a sports shop, bookstore, cocktail lounge, cafeteria, ice cream shop, snack bar, cash machine, flower vending machine, currency exchange, and shoeshine stand. The walls of the shopping areas are lined with commercial advertisements, and four rotating advertising displays are located in the ticketing area. Seating areas, a motor vehicle exhibit, encyclopedia kiosk, and post box are also located in the central lobby/corridor area. Attias Aff. at ¶ 47.

60. The arrivals level consists of a baggage retrieval area, and car rental and hotel reservation counters. *Id.* at ¶ 45.

D. Facts Pertinent to Newark.

61. The Port Authority has operated Newark International Airport under a lease with the City of Newark since March 22, 1948. Attias Aff. Ex. 3 at 1.

62. Located in Essex and Union counties between the New Jersey Turnpike and U.S. Routes 1 and 9, the airport consists of 2,300 acres, and is approximately 16 miles from mid-Manhattan. *Id.*

63. The airport complex includes: (1) three runways extending a total of 4.7 miles which are connected by more than 12 miles of taxiways; (2) a Marriott Hotel located in the center of the terminal area; (3) ancillary facilities such as a large aviation fuel storage area with tank capacity of approximately 10,000,000 gallons, an underground fuel distribution system and a central heating and refrigeration plant; (4) a 1,010,500 square foot U.S. Postal Facility; (5) the North Terminal; (6) the Central Terminal Area (CTA) consisting of three terminals; and (7) other buildings such as the air cargo center, the Cummins Diesel Industrial Building, utility, equipment and storage buildings, and various hangars. *Id.* at 2-4.

64. In 1986, Newark served 29,433,000 domestic and overseas travellers, *id.* Ex. 5 at 3, making it the busiest of the three metropolitan airports, and the seventh busiest airport in the world. *Id.* Ex. 7 at 3.

65. The terminal facilities are located in two areas. The North Terminal is situated along Brewster Road, while Terminals A, B and C are located adjacent to one another in the Central Terminal Area. *Id.* Ex. 8 at 12.

66. The North Terminal is a one level building consisting of ticketing and baggage check-in areas, baggage retrieval areas, and numerous patron facilities including two restaurants, a cocktail lounge, fruit and nut shop, nursery, newsstand, duty free gift shop, shoeshine stand, bank, cafeteria, travel insurance facility, postal facility, ice cream shop, currency exchange, and car rental counters. Attias Aff. at ¶ 6.

67. Terminals A and B measure 800 by 165 feet, and branch out to three satellite aircraft gate buildings. Each terminal has an upper departure level with facilities for airline ticketing and baggage check-in; a lower arrival level for airline baggage claim and ground transportation; and a ground level parking level extending under the arrival and departure roadways and the main buildings themselves. Attias Aff. Ex. 3 at 1-2.

68. The concourse level, for circulation and passenger service, is located halfway between the upper and lower levels of each terminal building, and contains eating facilities, retail stores and other patron services. *Id.* at 2. The concourse level at Terminal A includes spacious corridors bordered by two cocktail lounges, three postal facilities, a barber shop, shoeshine stand, duty free shop, bank, newsstand, ice cream shop, restaurant, nursery, two travel insurance facilities, two telegraph facilities, two gift shops, and a traveller's check/cash machine. Attias Aff. at ¶ 8. Additionally, the three satellites at Terminal A

each contain a coffee shop, newsstand, cocktail lounge, and travel insurance facility. *Id.* at ¶ 9. Six rotating advertising displays are located on the concourse level, and four rotating advertising displays are located in the departure level, along with two motor vehicle displays. *Id.* at ¶ 10.

69. The concourse level at Terminal B includes spacious corridors bordered by two cocktail lounges, three travel insurance facilities, three telegraph facilities, two nurseries, three postal facilities, a gift shop, shoeshine stand, drug store, newsstand, ice cream shop, coffee shop, book store, restaurant, bank, and a traveller's check/cash machine. *Id.* at ¶ 11. The concourse area also contains six rotating advertising displays. *Id.* at ¶ 12. The three satellite buildings each contain a coffee shop, cocktail lounge and newsstand. *Id.* at ¶ 13.

70. Terminal C is not yet fully operational, but presently includes a new international arrivals facility. With two aircraft gate positions and related terminal space, it also houses the airport's federal inspections services. Attias Aff. Ex. 3 at 2. The departure level of the terminal includes a cafeteria, cocktail lounge, snack bar, duty free shop, currency exchange, and newsstand. *Id.* Ex. 8 at 14-15.

E. First Amendment Activities Presently Permitted And prohibited In The Terminals.

71. Of the terminal facilities presently existing at the three airports, plaintiffs are permitted to distribute their religious literature and solicit contributions to support their religion in the following areas: (1) the second

floor central lobby area at LaGuardia; (2) the main lobby area of the North Terminal at Newark; (3) the mezzanine level of Terminal B at Newark; and (4) the second floor central lobby/mezzanine area at the IAB. Declaration Of Brian Rumbaugh In Opposition To Defendants' Motion To Dismiss at ¶ 3.

72. Additionally, by agreement with Eastern Airlines, plaintiffs have limited access to the Eastern unit terminal at JFK, the Eastern shuttle terminal at LaGuardia, and the Eastern departure area at the CTB at LaGuardia. *Id.* at ¶ 4.

73. Plaintiffs do not seek to perform *sankirtan* activities in any private offices, ticket counters and lines, check-in areas, baggage claim areas or lines, or exclusively leased waiting areas. Rather, plaintiffs seek to distribute religious literature, solicit donations and proselytize only in general circulation areas, including corridors, lobbies, and areas which are bordered by shops, restaurants, lounges and other commercial establishments and patron facilities. *Id.* at ¶ 6.

74. The Port Authority presently prohibits plaintiffs from conducting *sankirtan* activities at the arrivals level lobby of the IAB, the second floor East and West wing corridors at LaGuardia, the West wing second floor lobby area at LaGuardia, in any of the first floor corridor circulation areas at LaGuardia, and in any of the Fingers at LaGuardia. *Id.* at ¶ 5.

75. The foreign flag carriers have adopted a policy against permitting the premises and facilities which they lease from the Port to be used by others, including plaintiffs, for purposes of solicitation, peddling, panhandling,

lecturing, selling, proselytizing, leafletting, or other similar activities which the airlines deem inconsistent with or which might interfere with the conduct of their business as commercial air carriers. On this basis, the foreign flag carriers purportedly prohibit plaintiffs from performing *sankirtan* activities in the general circulation lobby and corridor areas of the second floor at the IAB. Nelson-Smith Aff. at ¶ 5; Soliman Aff. at ¶ 5; Anderson Aff. at ¶ 5; Othani Aff. at ¶ 5; Moore Aff. at ¶ 5; Jorgensen Aff. at ¶ 5; Zutshi Aff. at ¶ 5; Alcazar Aff. at ¶ 5; Haytink Aff. at ¶¶ 9,10; Ricci Aff. at ¶¶ 9,10.

76. The domestic air carriers have adopted a policy prohibiting plaintiffs and other groups and individuals from distributing religious literature, soliciting donations and performing other such activities in the premises which they lease from the Port which may be disruptive to their business. On this basis, the domestic air carriers purportedly prohibit plaintiffs from performing *sankirtan* in the following areas: (1) the general circulation lobby and corridor areas of the unit terminals at JFK and LaGuardia airports, other than the Eastern terminals; (2) the departure lobby circulation areas of the second floor at LaGuardia; (3) the arrivals level general circulation and lobby and corridor areas of Terminals A and B at Newark; and (4) the departure level mezzanine lobby and general circulation areas at Terminals A and B at Newark. Buhler Aff. at ¶¶ 11,13; Pagen Aff. ¶¶ 20,22; Thorne Aff. ¶¶ 18,20; Depoy Aff. at ¶¶ 17,19; Blackmon Aff. at ¶¶ 14,16; Wesson Aff. at ¶¶ 17,19; Wildbergh Aff. ¶¶ 10,12; Dutton Aff. at ¶¶ 20,22; Seaman Aff. ¶¶ 20,22.

F. Facts Pertaining To Public Access To The Airport Terminals.

77. Neither the Port Authority nor the airlines deny access by members of the general public to any of the three airport complexes. Nor do they deny or monitor access by members of the general public to the interior, general circulation areas of the central terminals at LaGuardia, JFK and Newark to only those persons utilizing those facilities for purposes of air travel or for meeting or greeting airline passengers. The Port Authority and airlines do not prohibit members of the general public from utilizing patron facilities located within the terminals for such purposes as shopping at the various stores, eating and drinking at one of the cafeterias, restaurants, snack bars, or cocktail lounges, patronizing the banks, currency exchanges, traveller's check/cash vending facilities, postal services or other such facilities at the airports, or for sightseeing.

78. Pan American Airlines does not restrict or otherwise monitor access by members of the general public to the interior general circulation areas of its unit terminal at JFK. Pan American does not attempt to restrict members of the general public from eating at one of the restaurants or other eating facilities, shopping at one of the stores, or watching planes land and take off. Deposition of George Vergonis, Dec. 13, 1984, at 49-50.

79. United Airlines does not have a policy restricting access by members of the general public to the interior general circlation areas of its unit terminal at JFK to only those persons using unit terminal facilities for air travel or for the purpose of meeting or greeting airlines

passengers. Deposition of Gus H. London, Dec. 12, 1984, at 22-24.

80. Northwest Airlines does not restrict access by members of the general public from eating, shopping, or using other patron facilities at its unit terminal at JFK. Deposition of Harry W. Frankson, Dec. 13, 1984, at 53-54.

81. The Salvation Army was permitted to set up a donation kettle in the main level general circulation lobby area of the Northwest unit terminal at JFK on three occasions, the most recent being in 1984. *Id.* at 32-34. The Salvation Army kettle did not cause any adverse impact on congestion in the terminal. *Id.* at 40

82. American Airlines does not have a policy restricting or otherwise monitoring access by members of the general public to the interior general circulation areas of its unit terminal at JFK. Deposition of Ed Cipperly, Dec. 12, 1984, at 29.

83. TWA does not have a policy restricting access to the interior portions of its unit terminals at JFK to business invitees only. Members of the general public are not restricted from eating at one of the restaurants located in the terminals, or from patronizing other such establishments. Deposition of Steven Brown, April 16, 1985, at 67-68.

G. Facts Pertaining To Planned Expansion Of The Airports.

84. In 1986, the Port Authority developed a multi-billion dollar capital plan to rebuild and modernize JFK, Newark and LaGuardia Airports. Major components of

the plan call for an expansion of the airport roadway systems, reconfiguration of a number of existing passenger terminals, construction of major new terminal facilities such as parking, inter-terminal connections, and baggage handling systems, and the addition of new restaurants, meeting rooms, communication and financial services, and retail shops. Attias Aff. Ex. 5 at 1.

85. The cost to the Port Authority of these improvements is estimated to be $2.4 billion for the period 1987-1991, with additional spending needed to complete the improvements in the 1990s. *Id*. Ex. 6 at 8.

86. At JFK, the Port Authority is planning an extensive redevelopment and reconstruction program over a 10-year period that will cost approximately $3 billion. More than $1 billion of this amount is included in the present five-year capital plan. *Id*. Ex. 7 at 5. The components of this major capital plan, which is designed to integrate the airport into a unified system, include expansion of the IAB; an automated baggage handling system; and, a "people mover" rail system that will connect each of JFK's unit terminals to a new central transportation hub. The new transportation building, moreover, will be connected to the IAB by an enlarged Federal Inspection Services Hall, and will contain parking facilities, retail shops and restaurants, and meeting and conference rooms. A reconfigured roadway system and a new control tower for the Federal Aviation Agency will also be included in the capital plan. *Id*. at 5-8.

87. The aviation capital plan also entails $200 million for new projects at LaGuardia airport. Major components of this plan include expansion and reconstruction

for the current CTB; construction of a new 250,000 square foot, two-level passenger terminal at the airport's east end; a major roadway improvement system; and construction of an underground hydrant fueling system. *Id*. Ex. 4 at 21; Ex. 6 at 9.

88. The Port Authority has allocated a total of $1.35 billion for new projects at Newark. Of this amount, $650 million is provided for under the present five-year capital plan. *Id*. Ex. 6 at 9; Ex. 4 at 21. The main elements of this program include major restructuring of the airport's roadway system, parking lots and terminal frontage; an on-airport "people mover" system linking Terminals A, B and C and the existing long term parking lots, and having the capacity to connect to an off-airport transit system, and; construction of a structural parking facility in the central terminal area. *Id*. Ex. 7 at 3; Ex. 5 at 17.

89. The Port Authority will also continue to be heavily involved in the completion of Terminal C at Newark, and the financing of two concourses which will add 42 new gates and 850,000 additional square feet to the Terminal. *Id*. Ex. 7 at 3.

III. STATE ACTION FACTS.

A. Facts Pertaining To Port Authority Construction, Financing And Ownership Of Airport Facilities, And Control Over Construction Performed By Lessees.

90. The real estate comprising the three airports, as well as the structures, fixtures, and improvements situated thereon, is owned by the Cities of New York and

New Jersey, and held by the Port Authority pursuant to long term ground leases.

91. About $60,000,000 was expended by the City of New York on original construction of JFK. Through June 30, 1984, the Port had invested approximately $781,554,000 at the airport, Attias Aff. Ex. 1 at 1, and plans to invest approximately another $3 billion over the next 10 years pursuant to its capital improvement plan. *Id*. Ex. 7 at 5.

92. The City of New York expended approximately $40 million on construction of LaGuardia Airport. As of June 30, 1984, the Port had invested $301.2 million in development of the airport, including $48 million from federal and state agencies. *Id*. Ex. 2 at 1. The Port plans to invest another $200 million over the next five years pursuant to its capital improvement plan. *Id*. Ex. 4 at 21; Ex. 6 at 9.

93. The City of Newark spent over $8,200,000 on construction and development of its airport; the U.S. government spent over $15,100,000 prior to 1948. By the end of 1984, the Port had invested over $500,000,000 at the airport, *id*. Ex. 3 at 1, and plans to invest an additional $1.35 billion in further capital improvements. *Id*. Ex. 4 at 21; Ex. 6 at 9.

94. The Port Authority is involved in every phase of airport operations, including negotiations with the airlines, planning construction of terminal facilities, operating public areas of the airports, maintaining public areas of the airports, and policing the public areas of the airports. Deposition of Morris Sloane, June 10, 1985, at 7.

95. The Port Authority constructed, paid for, and operates the public aircraft facilities at the three airports, which includes runways, taxiways, and adjacent spaces. The airlines may use these facilities for a fee. *Id*. at 98.

96. The IAB was constructed, paid for, and is operated by the Port Authority. *Id*. at 26, 109.

97. The Port Authority constructed and paid for the East and West wing buildings at JFK. *Id*. at 23, 109; JFK Wing Lease, § 2.

98. The CTB at LaGuardia, and Terminals A, B and C at Newark were financed and constructed by the Port Authority. *Id*. at 65, 110; LGA Lease § 1; Newark Lease § 1.

99. The Port Authority financed the construction costs of American Airline's terminal facilities at LaGuardia and JFK. Answers And Objections Of Defendants Air Canada, Et Al., To Plaintiffs' Interrogatories And Request For Production Of Documents To Defendants, Sept. 24, 1984, ¶ 14.

100. Delta Airlines provided funds for its unit terminal at LaGuardia, but was reimbursed by the Port Authority under an industrial bond financing arrangement. *Id*.

101. Northwest Airlines advanced the funds necessary to construct its unit terminal at JFK, but following completion of the construction was reimbursed by the Port Authority. *Id*.

102. Piedmont Airlines borrowed funds from the Port Authority for construction of its interior facilities at

Terminal A at Newark, which it is repaying through rental payments. *Id.*

103. The Port Authority paid for the British Airways and TWA domestic unit terminals at JFK. Sloane Deposition at 23.

104. The Port Authority constructed the Pan American unit terminal at JFK. *Id.* at 25-26.

105. The Port Authority financed construction of the Eastern Shuttle Terminal at LaGuardia. *Id.* at 72.

106. Prior to commencement of any construction, lessees at all of the airports are required to submit a construction application, including complete plans and specifications for the proposed construction, to the Port Authority for approval. JFK Wing Lease § 2(b); Newark Lease § 4; LGA Lease §§ 6(d), 9(b); TWA JFK Lease § 2; Eastern JFK Lease § 2; United JFK Lease § 2; British Airways JFK Lease § 2; Northwest JFK Lease § 2; Pan Am JFK Lease § 2; American JFK Lease § 2. The lessees must comply with all requirements, stipulations, and provisions that may be required by the Port, and the Port may refuse to grant its approval if the proposed construction violates certain specified conditions. JFK Wing Lease § 2; Newark Lease § 4; LGA Lease § 6(d); TWA JFK Lease § 2; Eastern JFK Lease § 2; Pan Am JFK Lease § 2; American JFK Lease § 2.

107. Prior to retaining or contracting with a architect or contractor to perform work on the proposed terminals, the lessee may also be required to submit the name of the architect or contractor to the Port for approval. JFK Wing Lease § 2; TWA JFK Lease § 2; British Airways JFK

Lease § 2; Pan Am JFK Lease § 2; American JFK Lease § 2. Additionally, the lessee may be required to submit to the Port all engineering studies, renderings, layouts, calculations and other data which the Port may request both prior to and during the construction. JFK Wing Lease § 2.

108. The Port Authority maintains the right to inspect the construction either at any and all times during the progress thereof, JFK Wing Lease § 2(d); Newark Lease § 4, LGA Lease § 6(d); TWA JFK Lease § 2; Pan Am JFK Lease § 2(d)(2),(6); Northwest JFK Lease § 2; American JFK Lease § 2(b)(2),(6); British Airways JFK Lease § 2, or upon substantial completion of the construction. United JFK Lease § 2; Eastern JFK Lease § 2. The Port may also require the lessee to re-do or replace any work or material not installed or performed in accordance with the approved plans and specifications. JFK Wing Lease § 2(f); LGA Lease §§ 2(b)(2),(6); British Airways JFK Lease § 2.

109. Upon completion, title to any construction work performed by the lessees, including construction of the JFK unit terminals, vests in either the City of New York or the City of Newark, and becomes a part of the leased premises. JFK Wing Lease § 2(j)(4); LGA Lease §§ 6(b), 9(b); Newark Lease § 4; TWA JFK Lease § 2; Eastern JFK Lease § 2; Northwest JFK Lease § 2; British Airways JFK Lease § 2; American JFK Lease § 2(g); Pan Am JFK Lease § 2(k); United JFK Lease § 2.

110. The lessees are prohibited from making any additional improvements, alterations, modifications, or additions to the existing facilities – whether exclusively leased or leased in common – without the prior written

consent of the Port. Should such unauthorized work be performed by the lessee, the Port may insist that the work be changed, modified or removed. JFK Wing Lease § 35; Newark Lease § 44, TWA JFK Lease § 31; United JFK Lease § 31; American JFK Lease § 33; Pan Am JFK Lease § 33; British Airways JFK Lease § 33; Northwest JFK Lease § 31; Eastern JFK Lease § 31; Delta LGA Lease § 33.

B. Facts Pertaining To Lease Arrangements Between The Port Authority And Airlines.

111. The Port Authority leases space at the three airports to privately owned airlines, as well as other commercial establishments and patron facilities such as shops, restaurants, newsstands, travel insurance facilities, banks, and so forth. There are two primary types of buildings in which the airlines lease space from the Port Authority: (1) free standing units at JFK and LaGuardia, and (2) central terminals at JFK, LaGuardia and Newark.

1. Facts Pertaining To The Unit Terminals.

112. At JFK, seven of the defendant airlines – Pan Am, American, TWA, United, Northwest, British Airways and Eastern – lease and occupy unit terminal buildings. Buhler Aff. at ¶ 3; Seaman Aff. at ¶ 3; Thorne Aff. at ¶ 3; Wildbergh Aff. at ¶ 3; Eastern JFK Lease. Delta occupies a unit terminal building at LaGuardia. Wesson Aff. at ¶ 6.

113. USAir and Delta sublease space in the unit terminal buildings of British Airways and Northwest, respectively. Depoy Aff. at ¶ 3; Wesson Aff. at ¶ 3. Northwest subleases space in Delta's unit terminal building at

LaGuardia. Thorne Aff. at ¶ 9. Each of the subleases are subject to the terms and conditions of the prime tenants' leases with the Port Authority. Depoy Aff. at ¶ 4; Wesson Aff. at ¶ 4; Thorne Aff. at ¶ 10.

114. The leased premises at the unit terminals include not only the land upon which the terminals are situated, but all fixtures, improvements and property located or to be constructed thereon. TWA JFK Lease § 1; Eastern JFK Lease § 1; American JFK Lease § 1; Northwest JFK Lease § 1; British Airways JFK Lease § 1; Pan Am JFK Lease § 1; United JFK Lease § 1; Delta LGA Lease § 1(a).

115. The Port Authority supplies the unit terminals with various utilities, such as electricity, hot and cold water, and sewerage services, and the airlines pay for these services. British Airways JFK Lease §§ 39(b), (c) & (d); Northwest JFK Lease §§ 36 (b), (c) & (d); Pan Am JFK Lease §§ 40(a), (b) & (c); TWA JFK Lease §§ 36(b), (c) & (d); United JFK Lease §§ 38(b), (c) & (d); Eastern JFK Lease § 38; American JFK Lease §§ 40,41; Delta LGA Lease § 39.

116. The airlines are responsible for all maintenance and repair work in their unit terminals. British Airways JFK Lease § 10; Northwest JFK Lease § 10; Pan Am JFK Lease 10; TWA JFK Lease § 10; United JFK Lease § 10; Wesson Aff. at ¶ 5; Eastern JFK Lease § 10; Delta LGA Lease § 10(a). They are also responsible for removing garbage from the premises in a manner that has been approved by the Port Authority. British Airways JFK Lease § 8(e); Northwest JFK Lease § 8(e); Pan Am JFK Lease § 8(e); TWA JFK Lease § 8(e); United JFK Lease

§ 8(e); Wesson Aff. at ¶ 5; Eastern JFK Lease § 8; Delta LGA Lease § 8(c).

117. The unit terminal airlines must procure property damage insurance for their premises. British Airways JFK Lease § 11; Northwest JFK Lease § 11; Pan Am JFK Lease § 11; TWA JFK Lease § 11; United JFK Lease § 11; Eastern JFK Lease § 11; Delta LGA Lease § 11.

118. The unit terminal lessees subcontract with guard services in order to fulfill their obligation to provide security in the leased premises. Buhler Aff. at ¶ 8; Dutton Aff. at ¶ 8; Pagen Aff. at ¶ 4; Seaman Aff at ¶ 8; Thorne Aff. at ¶ 8; Wildbergh Aff. ¶ 7; Wesson Aff. at ¶ 10.

119. The unit terminal leases require the airlines to prevent people and non-aircraft vehicles, unless otherwise authorized by the Port Authority, from having access to the Public Landing Area. The manner by which the airlines maintain this control is subject to Port Authority approval. British Airways JFK Lease § 9(g); Northwest JFK Lease § 9(g); Pan Am JFK Lease § 9(g); TWA JFK Lease § 9(g); United JFK Lease § 9(g); Eastern JFK Lease § 9(g); Delta LGA Lease § 9(g).

2. Facts Pertaining To The Central Terminals.

120. Air India, Iberia, Icelandair, Irish International, Japan Air, Scandanavian Airlines, Sabena, Varig, Alitalia, KLM and Luftansa lease space from the Port Authority at the IAB. Zutshi Aff. at ¶ 4; Alcazar Aff. at ¶ 4; Jorgensen Aff. at ¶ 4; Moore Aff. at ¶ 4; Othani Aff. at ¶ 4; Anderson

Aff. at ¶ 4; Soliman Aff. at ¶ 4; Nelson-Smith Aff. at ¶ 4; Haytink Aff. at ¶ 1; Ricci Aff. at ¶ 1.

121. Piedmont, USAir, American, TWA, United and Eastern lease office space and premises for ticket counters, passenger and baggage check areas, passenger lounges and waiting areas in the LaGuardia Central Terminal building. In common with other airlines, they lease concourse corridors leading to departure gates. Blackmon Aff. at ¶ 5; Depoy Aff. at ¶ 7; Dutton Aff. at ¶ 10; Pagen Aff. at ¶ 10; Seaman Aff. at ¶ 10.

122. Piedmont, USAir, United, Northwest, Delta and Eastern lease similar premises in Terminals A and B at Newark. They also lease certain common terminal areas as tenants in common with other airlines. Blackmon Aff. at ¶ 9; Depoy Aff. at ¶ 12; Seaman Aff. at ¶ 15; Thorne Aff. at ¶ 16; Wesson Aff. at ¶ 12.

123. The premises within each of these terminals were conveyed to the airlines in an unfinished state. The leases required the airlines to perform certain work, such as design and construction of stairways, escalators and counters, to place the premises in appropriate operating condition. JFK Wing Lease § 2; LGA Lease § 6(d); Newark Lease § 4. The plans and, in the case of the Wing buildings, the choice of architect, were subject to prior Port Authority approval. JFK Wing Lease §§ 2(b) & (c); LGA Lease § 6(d); Newark Lease § 4.

124. At JFK and Newark, the airlines may not modify their premises without Port Authority permission. JFK Wing Lease § 35; Newark Lease § 44. At LaGuardia, airlines may not build new structures on their premises without Port Authority permission. LGA Lease § 25. Title

to all construction work performed by the airlines vests in the City of New York or Newark. JFK Wing Lease § 2(j)(4); LGA Lease § 6(d); Newark Lease § 4.

125. In the JFK Wing buildings, the Port, at its own expense, is obligated to maintain and make all necessary repairs and replacements to the foundations, exterior walls and supporting frame and roof. JFK Wing Lease § 16(d)(i). The Port is also required to maintain all service pipes, wires, mains, lines, tubes, and ducts passing through or under the premises, and is further required to maintain any other portion of the premises which it has built. *Id.*

126. The Port is also responsible for all necessary cleaning and maintenance in the interior and exterior commonly leased premises of the Wing buildings. *Id.* § 17(a)-(d). In the exterior areas, these services include the performance of "all necessary maintenance, including but not limited to, the making of all necessary repairs, replacements (including relamping), repairing and rebuilding, and . . . snow and ice removal." *Id.* § 17(b). In the interior areas (including the second floor corridor and lobby areas), these services entail the performance of "all necessary maintenance, including but not limited to painting, the making of all necessary repairs, replacements (including relamping), repaving, reflooring, refurbishing and rebuilding." *Id.* § 17(c).

127. A number of other services are provided by the Port in the Wing buildings, including porter services for handling baggage, *id.* § 41(a); the provision of space for customs, immigration and health purposes, *id.* § 41(b);

ramp coordination services, *id.* § 41(c); incineration services, *id.* § 41(d); installation, operation and maintenance of the Arrivals Board in the main Arrivals Building, *id.* § 41(e); vehicular facilities for servicing the external areas of the Wing buildings, *id.* § 41(g); design, construction and installation of second level aircraft loading facilities, *id.* § 41(h); design, construction and installation of apron hydrant fueling facilities and vapor traps, *id.* § 41(i)(1); ground services for the second floor public circulation area, *id.* § 41(j); and a passenger transportation system which services the Central Terminal area, *id.* § 44.

128. The Port Authority is vested with overall responsibility for maintenance at LaGuardia Airport, including such areas and items as "the landing field, runways, aprons, taxiways, and the surface lights, boundary lights, floor lights, signals, radio beacons and aids, marker lights, sewerage facilities, roadways, streets, bridges, docks, wharfs and approaches thereto." LGA Lease § 20.

129. In the CTB, the Port Authority, "at its own costs and expense," is required to "maintain and make all necessary repairs and replacements to the foundations, exterior walls, and the structural supporting frame and roof of the building, and of its main service pipes, wires, mains, lines, ducts and conduits passing through or under the Terminal Building Space." *Id.* § 6(i)(3). In addition, the Port is responsible "at all times" to "repaint, repair and keep in a clean and orderly condition and appearance the common areas . . . and to perform, at its own cost and expense, all necessary maintenance, . . . repairs, replacements and rebuilding." *Id.* § 6(i)(5). And in the event that the CTB is damaged by fire

or other casualty, the Port Authority, at its own cost and expense, shall repair or rebuild the damaged premises "with all proper speed." *Id.* § 6(j).

130. Also at LaGuardia, if the lessees so request, "the Port Authority for and behalf of the Lessee will perform the necessary work in connection with any substantial rehabilitation of the Lessee's hangar space," *id.* § 5(d), and in the event of damage or destruction of the hangar buildings by fire or other casualty, "the same shall be repaired [or rebuilt] with all proper speed at the [Port's] expense." *Id.* § 5(f).

131. At Newark, the Port provides substantial services to the lessees, including the operation and maintenance of a fuel storage and distribution system for the receipt, storage and delivery of aviation fuel to the lessees, Newark Lease § 18, incineration facilities, *id.* § 36, extermination services, *id.* § 24(c), and an inter-terminal transportation system for airline passengers, *id.* § 69.

132. Also at Newark, each airline is responsible for all maintenance and repair in its exclusive areas and has the joint obligation with the other airlines to maintain and repair the non-exclusive areas. *Id.* § 30. If the airlines desire porter services, the contractor is subject to Port Authority approval. *Id.* § 25.

133. At JFK and LaGuardia, the Port Authority provides utility services in both the exclusive and non-exclusive areas, and the airlines pay for the service. JFK Wing Lease §§ 66 & 67; LGA Lease § 6(k). At Newark, the Port Authority provides a central heating and a refrigeration system, for which the airlines pay. Newark Lease § 5. At

JFK and Newark, the airlines are responsible for removing garbage from their premises in a manner that has been approved by the Port Authority. JFK Wing Lease § 13(d); Newark Lease § 39.

134. The Port Authority provides security services at JFK, although the airlines must pay for this service. JFK Wing Lease §§ 7(h) & 41(j). At Newark, each airline is responsible for providing security which is satisfactory to the Port. Newark Lease § 39(e). If the airlines fail to discharge their security obligations, then the Port will provide the necessary personnel, and the airlines must reimburse it for the expenses. *Id.* § 30(b)(7).

135. In the Wing buildings, each airline may use only seventy-five percent of the aggregate floor space within its exclusively leased premises unless special permission is obtained from the Port Authority. JFK Wing Lease § 10(I)(f). Portions of the common area A-1 may be designated Departure Hold areas by the Port Authority. These areas may be used only by employees and passengers unless otherwise authorized by the Port Authority. *Id.* § 10(II)(a). The Port Authority also establishes procedures governing the use of the Ramp and Apron areas by the aircraft operators *id.* at § 10(II)(b)(a), and it may establish procedures governing the use of the Departure Area (A-l), the Loading and Unloading Vestibules (A-4), the Arrivals Board, the vehicular service, the public address system, and the aircraft loading facilities. *Id.* at § 10(II)(b)(6)(b).

3. Facts Pertaining To Consumer Services At The Three Airports.

136. The Port Authority maintains the exclusive right to provide consumer services in both the exclusively and non-exclusively leased parts of the three airports. These consumer services operations include food and beverage facilities, LGA Lease § 7; Newark Lease § 29(i); TWA JFK Lease § 40; Northwest JFK Lease § 43; United JFK Lease § 43; Pan Am JFK Lease § 43; Eastern JFK Lease § 43; British Airways JFK Lease § 42; American JFK Lease § 44, vending machines, public telephones, and advertising displays, JFK Wing Lease § 15; LGA Lease § 7; Newark Lease § 29(ii); TWA JFK Lease § 41; Northwest JFK Lease § 40; United JFK Lease § 44; Pan Am JFK Lease § 44; Eastern JFK Lease § 44; British Airways JFK Lease § 43; American JFK Lease § 45, air travel insurance facilities, JFK Wing Lease § 15(b)(2); LGA Lease § 7; Newark Lease § 29(iii); TWA JFK Lease § 42; Northwest JFK Lease § 41; United JFK Lease § 45; Pan Am JFK Lease § 45; Eastern JFK Lease § 45; British Airways JFK Lease § 44; American JFK Lease § 46, newsstands, JFK Wing Lease § 15(b)(5)(iv); LGA Lease § 7; Newark Lease § 29(iv); TWA JFK Lease § 43; Northwest JFK Lease § 7; United JFK Lease § 46; Pan Am JFK Lease § 47, and operation of such other commercial establishments as may be required, JFK Wing Lease § 14(b)(5)(iv); LGA Lease § 7; Newark Lease § 29(v)(a); TWA JFK Lease § 44; Northwest JFK § 43; United JFK Lease § 47; Pan Am JFK Lease § 47; Eastern JFK Lease § 47; British Airways Lease § 46; American JFK Lease § 48. The Port also provides surface transportation for air travel passengers in and between the various terminals at the airports. JFK Wing Lease § 44;

Newark Lease, § 69; American JFK Lease § 63; Pan Am JFK Lease § 66.

137. Delta Airlines may select its own restaurant operator to manage its facilities in its LaGuardia unit terminal. The restaurant operator must obtain a permit from the Port Authority and must pay both the airline and the Port Authority a percentage fee based upon its gross receipts. Delta LGA Lease § 42.

138. Delta may also contract with its own newsstand and gift store operators at its LaGuardia unit terminal. These operators must obtain a permit from the Port Authority, and must pay a fee to the Port. Delta LGA Lease § 45.

139. At Newark and the JFK unit terminals, the Port receives an agreed-upon percentage of the gross receipts generated from the food and beverage, vending machine, public telephone and advertising operations. Eighty percent of the percentage fee received by the Port is then paid to the lessees of the areas in which the consumer services are located, Newark Lease §§ 26(i)(v); TWA JFK Lease §§ 40-41; Northwest JFK Lease §§ 26(i)-(v); United JFK Lease §§ 44-45; Pan Am JFK Lease §§ 43-44; Eastern JFK Lease §§ 43-44; British Airways JFK Lease §§ 42-43; American JFK Lease §§ 44-45, and twenty percent is retained by the Port. *Id.*

140. At Newark and the JFK wing and unit terminals, the Port imposes a flat rental fee on space for the travel insurance, newsstand and gift shop facilities. The Port also receives a percentage of the gross receipts generated from such facilities, less the basic rental fee. The lessees, in turn, receive the basic rental fee from the Port.

If the percentage fee paid to the Port by the consumer service operator exceeds the amount of the basic rental, the excess, if any, is divided equally between the Port and the airline lessees. Newark Lease §§ 26(iii) & (iv); JFK Wing Lease § 15(b)(5); TWA JFK Lease §§ 42-44; Northwest JFK Basic Lease § 41-43; United JFK Lease §§ 45-47; Pan Am JFK Basic Lease §§ 45-47; Eastern JFK Lease §§ 45-47; British Airways JFK Lease §§ 44-46; American JFK Basic Lease §§ 46-48.

141. In the wing buildings, the airlines may maintain a bar within their exclusively leased premises. However, they must use the Port Authority Consumer Services Operator and the Port Authority is entitled to a percentage of the profits. JFK Wing Lease § 15(b)(1). The Port Authority will furnish air transportation insurance vendors through its operator. *Id.* § 15(b)(2).

142. Only the Port Authority may install vending machines in the wing buildings, and it retains the proceeds. *Id.* § 15(b)(3). If the airlines wish to sell other merchandise, the Port Authority is entitled to a percentage of the gross receipts. *Id.* § 15(b)(5). The airlines also may not sell advertising space in their terminals without Port Authority approval. *Id.* § 15(b)(4).

143. At LaGuardia, the Port Authority maintains a restaurant in the common area. LGA Lease § 7. It also provides supplemental consumer services, such as newsstands, air transportation insurance, vending machines and advertising displays if the airlines desire such services. *Id.* The airlines may maintain clubrooms using their own personnel; however, they may be required to pay the Port Authority a fee to do so. *Id.* at § 8.

144. At Newark, the airlines may not install or operate vending machines of any kind or maintain any kind of eating establishment unless expressly permitted to do so by the Port Authority. Newark Lease § 26. The Port Authority will provide such consumer services and it will share the fees with the airlines. *Id.* § 49.

145. The unit terminal lessees at JFK are permitted to operate observation decks, but the Port is entitled to 30% of the gross receipts generated therefrom. TWA JFK Lease § 49; Eastern JFK Lease § 51; British Airways JFK Lease § 51; Northwest JFK Basic Lease § 48; United JFK Lease § 51; American JFK Basic Lease § 53; Pan Am JFK Basic Lease § 52.

4. Facts Pertaining To Port Authority Control Over The Leased Areas.

146. The Port Authority has reserved a right of entry to inspect the leased premises. British Airways JFK Lease § 17(a); Northwest JFK Lease § 17(a) Pan Am JFK Lease § 17(a); TWA JFK Lease § 17(a); United JFK Lease § 17(a); Eastern JFK Lease § 17(a); Delta LGA Lease § 17(a); JFK Wing Lease § 21(a); LGA Lease § 33; Newark Lease § 46(a).

147. At the unit terminals and the central terminals at JFK and Newark, the Port may construct utility, mechanical and electrical systems on the leased premises and has reserved the right to enter the premises to install, repair, replace or alter these systems. British Airways JFK Lease § 17(b); Northwest JFK Lease § 17(b); Pan Am JFK Lease § 17(b); TWA JFK Lease § 17(b); United JFK Lease

§ 17(b); Eastern JFK Lease § 17(b); Delta LGA Lease § 17(b); JFK Wing Lease 21(b); Newark Lease § 46(b).

148. The airlines may not display signs or advertising on the exterior of the unit terminals or the central terminals at JFK or Newark without obtaining written permission from the Port Authority. British Airways JFK Lease § 14(a); Northwest JFK Lease § 14(a); Pan Am JFK Lease § 14(a); TWA JFK Lease § 14(a); United JFK Lease § 14(a); Eastern JFK Lease § 14(a); American JFK Lease § 14; Delta LGA Lease § 14; JFK Wing Lease § 19(A)(1); Newark Lease § 34(a). The airlines must also obtain written consent from the Port Authority before subletting any part of their premises. British Airways JFK Lease § 19(b); Northwest JFK Lease § 19(b); Pan Am JFK Lease § 19(b); TWA JFK Lease § 19(b); United JFK Lease § 19(b); Eastern JFK Lease § 19(b); JFK American Lease § 19; Delta LGA Lease § 19; JFK Wing Lease § 23(b); LGA Lease § 31; Newark Lease § 21(b).

149. At JFK and Newark the Port Authority has the right to object to the conduct and demeanor of airline employees and passengers, and the airline must take all steps necessary to eliminate the problem. The Port Authority can also require all airline employees to wear badges. British Airlines JFK Lease § 8(c); Northwest JFK Lease § 8(c); Pan Am JFK Lease § 8(c); JFK Eastern Lease § 8(c); JFK American Lease § 8; Delta LGA Lease § 8(c); JFK Wing Lease § 13(c); Newark Lease § 39(c).

150. Each lessee must comply with all laws and governmental requirements. British Airways JFK Lease § 6(a); Northwest JFK Lease § 6(a); Pan Am JFK Lease § 6(a); TWA JFK Lease § 6(a); United JFK Lease § 6(a);

Eastern JFK Lease § 6(a); American JFK Lease § 6(a); Delta LGA Lease § 6(a); JFK Wing Lease § 11; Newark Lease § 38(a). The Port Authority may direct the lessees not to comply with those municipal rules and regulations that are applicable to the lessees only because of the Port Authority's lease agreements with the municipalities. The Port Authority must, however, indemnify the lessees for all liabilities incurred as a result of such noncompliance. British Airways JFK Lease § 6(c); Northwest JFK Lease § 6(c); Pan Am JFK Lease § 6(d); TWA JFK Lease § 6(c); United JFK Lease § 6(c); Eastern JFK Lease § 6(c); Delta LGA Lease § 6(d); JFK Wing Lease § 11(d); Newark Lease § 38(b).

151. Each lease contains a provision that limits the uses to which the premises may be put. British Airways JFK Lease § 5; Northwest JFK Lease § 5; Pan Am JFK Lease §§ 5 & 42; TWA JFK Lease §§ 5 & 54; United JFK Lease § 5; Eastern JFK Lease § 5; American JFK Lease § 5; Delta LGA Lease § 5; JFK Wing Lease § 10; LGA Lease § 6; Newark Lease § 11. Before using or allowing others to use the leased premises in a manner that conflicts or is not provided for under this provision, the airlines must obtain permission from the Port Authority. Sloane deposition at 91-92. Generally, the Port Authority will grant this permission if the proposed use will not adversely affect the safe operation of the airport. *Id.* at 92-93. Further, it is Port Authority policy that if an individual or group seeks to use the leased areas in a manner that is not consistent with the use provisions, it must first seek permission from the individual airline and not directly from the Port Authority. *Id.* at 84.

Dated: Los Angeles, California
November 11, 1987

Respectfully submitted,

David Grosz
Robert C. Moest
Barry A. Fisher
Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, Calif. 90067
(213) 557-1077

David Mark Liberman
9806 Washington Boulevard
Culver City, Calif. 90232
(213) 204-0488

By: _____
David Grosz

Jeremiah S. Gutman
Eugene N. Harley
Levy, Gutman, Goldberg & Kaplan
275 Seventh Avenue, Suite 1776
New York, N.Y. 10001
(212) 807-9733

By: _____
Eugene N. Harley

Attorneys for plaintiffs

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.	75 Civ. 5388 (MJL)
plaintiffs,	*AFFIDAVIT OF ALAN J. ATTIAS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT*
-against-	
WALTER LEE, etc., et al.,	
defendants.	

STATE OF FLORIDA : SS
COUNTY OF PALM BEACH :

ALAN J. ATTIAS, being duly sworn, deposes and says:

1. I am presently a legal investigator and paralegal in Boca Raton, Florida. From 1982-1986 I worked for William H. Ogle, attorney at law, in Knoxville, Tennessee in the same capacity.

2. I have also worked for David M. Liberman, one of the attorneys of record in the within matter, on several

First Amendment public forum cases, including *International Society For Krishna Consciousness v. City of Chicago*, No. 83 C1568 (N.D. Ill. 1983) and *Hynes v. City of Gatlinburg*, No. CIV-3-84-456 (E.D. Tenn 1984). In these cases, I was responsible for investigating and analyzing the public forum features of Chicago O'Hare International Airport, and the downtown commercial area of Gatlinburg, Tennessee, and compiling a comprehensive report for use in litigation.

3. Recently, I was retained by Mr. Liberman to make a similar investigation and report for John F. Kennedy (JFK), Newark International (Newark) and LaGuardia Airports.

4. On October 15, 1987, I visited the offices of the Port Authority of New York and New Jersey (Port Authority) at One World Trade Center, New York, N.Y., in order to acquire historical, logistical, statistical, and sociological information on the airports. In this regard, I collected Exhibit 1, "Fact Sheet John F. Kennedy International Airport," Exhibit 2, "Fact Sheet LaGuardia Airport," and Exhibit 3, "Fact Sheet Newark International Airport" from the Marketing and Economics Division of the Port Authority. These exhibits, true and correct copies of which are attached hereto, contain statistical, historical and logistical facts about the three airports.

5. At the Public Affairs Department of the Port Authority, I acquired Exhibit 4, "Port Authority Capital Program 1987-1991," Exhibit 5, "1986 Airport Highlights," Exhibit 6, News Release No. 38-87, Mar. 12, 1987, and Exhibit 7, News Release No. 39-87, Mar. 12, 1987. These Exhibits, true and correct copies of which are

attached to this Affidavit, contain not only statistical, sociological and logistical information about the airports, but also describe in significant detail an already approved major capital expansion program which will substantially improve, expand, and reconfigure the three airports over the next 5-15 years.

6. I also obtained Exhibit 8, "Getting Around At NIA," Exhibit 9, "Getting Around At JFK," and Exhibit 10, "Getting Around at LGA," from a free information rack at Newark. These brochures, true and correct copies of which are attached hereto, contain logistical information about the airports, including maps of the three airports and charts which specify the public facilities and services which are offered at the various airport terminals.

7. In addition to acquiring the above described exhibits, I personally surveyed each of the passenger terminals at the three airports, and noted the configuration of the general circulation areas, as well as the public facilities and services provided at each of the terminals.

8. On October 16, 1987, I spent several hours surveying the four terminals located at Newark. The North Terminal is a one level structure which contains a spacious lobby bordered by a ticketing and baggage check-in area. Also located in the lobby circulation area are two restaurants, a cocktail lounge, fruit and nut shop, nursery, newsstand, duty free shop, shoeshine stand, bank, cafeteria, travel insurance facility, postal facility, ice cream shop, currency exchange, and car rental counters. A seating area and baggage retrieval area are also located on the main level.

9. Newark Terminals A and B are structurally identical. Both consist of a ground floor arrivals level, a main floor departure level, and a mezzanine level located between the upper and lower levels. The arrival levels of both terminals consist of expansive corridors and walkways, interspersed with baggage retrieval areas and car rental and hotel reservation counters. The departure levels of each terminal consist of ticket and baggage check-in counters, and a spacious lobby/corridor area adjacent to the central escalators, which is flanked by passenger seating areas.

10. The concourse level of Terminal A includes long corridors bordered by two cocktail lounges, three postal facilities, a barber shop, shoeshine stand, duty free shop, bank, newsstand, ice cream shop restaurant, nursery, two travel insurance facilities, two telegraph facilities, two gift shops, and a traveller's check/cash machine.

11. Each of the satellites at Terminal A contain a coffee shop, newsstand, cocktail lounge, and travel insurance facility.

12. Additionally, six rotating advertising displays are located in the concourse level of Terminal A, and four rotating advertising displays are located in the departure level, along with two motor vehicle displays.

13. The concourse level at Terminal B includes spacious corridors bordered by two cocktail lounges, three travel insurance facilities, three telegraph facilities, two nurseries, three postal facilities, a gift shop, shoeshine stand, drug store, newsstand, ice cream shop, coffee shop, book store, restaurant, bank, and a traveller's check/cash machine.

14. The concourse area also contains six rotating advertising displays.

15. Additionally, the three satellite buildings each contain a coffee shop, cocktail lounge and newsstand.

16. On October 16, 1987, and on October 17, 1987, I spent over 12 hours surveying JFK, which includes eight unit terminals and the International Arrivals Building (IAB) complex. The IAB consists of two levels. The first level includes an expansive central lobby area located between the federal customs area and the front entrance of the building. The second level of the IAB includes a central mezzanine lobby area, and two long L-shaped corridors extending directly outward from the lobby area.

17. Located on the boundaries of the lobby/mezzanine area are two restaurants, two snack bars, a bar, a postal substation and postal facility, a bank, telegraph office, duty free boutique, drug store, nursery, barber shop, and two currency exchange facilities. The second floor mezzanine area also includes a dental office and an area for the display of art exhibits, which on the date that I was at the IAB featured a Salvador Dali display.

18. The L-shaped east wing corridor of the second floor IAB includes a large seating area located where the two corridors intersect. Lining both sides of both corridors are numerous commercial establishments and patron facilities, including six duty free shops, three bars, a snack bar, telegraph office, bank, currency exchange, bookstore, newsstand, India store, postal facility, cookie/candy shop, two travel insurance areas, and a retail Bloomingdale's. While I was present, the corridor also

contained 11 free standing commercial advertising displays, and two free standing public service displays.

19. The west wing corridor is essentially a mirror image of the east wing, and is bordered by four duty free shops, a newsstand, bookstore, currency exchange, snack bar, cookie/candy shop, American Express cash/traveller check machine, two bars and two travel insurance facilities. The corridor also provides for ample seating areas, as well as 11 free standing commercial advertising displays, and one free standing public service advertising display.

20. The Pan American unit terminal consists of a large oval building in front which leads to a triangular section immediately behind it. The first level includes a general ticketing and baggage check-in area, as well as a newsstand, gift shop and postal facility. The second level includes a snack bar and cocktail lounge.

21. Two long corridors interspersed with six aircraft gate positions lead to a rear corridor containing an expansive seating area and two duty free shops, two currency exchanges, a travel insurance facility, drug store, cocktail lounge, cafeteria, toy shop, bookshop, gourmet food shop, newsstand, restaurant, beauty shop, bank, and retail Bloomingdale's. The corridor walls are lined by commercial advertising billboards, and six rotating commercial advertising displays and one rotating public service advertising display are located in the floor area.

22. The Immigration and Baggage Pickup level of the Pan Am unit terminal includes car rental and hotel

reservation counters, an American Express machine and commercial advertising displays.

23. The Northwest/Delta unit terminal is a rectangular shaped building with an Inbound level, Outbound level, and mezzanine level. The front portion of the outbound level is comprised of the ticketing and baggage check-in area. Three main corridors lead to a rear corridor/hallway, and are bordered by numerous commercial establishments and patron facilities, including a large duty free shop in the central concourse area, a restaurant, cocktail lounge, currency exchange, travel insurance facility, traveler's check machine, and postal facility. Six commercial advertising stands are located throughout the outbound level.

24. The inbound level consists of the baggage retrieval area and a lobby area bordered by car rental and hotel reservations counters.

25. The Eastern unit terminal is a compact rectangular building with two concourses extending behind the building from both sides. The central terminal area consists of a ticketing and baggage check-in area, a spacious seating area, and a series of commercial shops situated in kiosks in the middle of the terminal.

26. A central hallway leads to a rear corridor which runs parallel to the front of the building. The rear corridor, in turn, leads into concourses at both ends, and is bordered by two giftshops, a drugstore, coffee shop, postal facility, newsstand, cutlery shop, restaurant/lounge, cookie shop, barber shop, shoeshine stand, and two duty free shops.

27. The Eastern unit terminal also contains an arrivals level where passengers retrieve their luggage. Located on this level, as well as on the main level, are rental car and hotel reservation counters and numerous free standing advertising displays.

28. The United unit terminal is a two level building with two concourses. The ticket and baggage area is located in the central portion of the main floor. On each side of the ticketing counters are lobby areas, and to the rear is a long corridor which connects the two lobbies. Located within the lobby/corridor area are two currency exchanges, two gift shops, two newsstands, three cocktail lounges, a duty free shop, restaurant, coffee shop, bank, postal facility, shoeshine stand, travel insurance facility, and traveller's check/cash machine. Also interspersed around the lobby area are five rotating advertising displays, as well as a motor vehicle exhibit.

29. On the ground level of the United terminal is the baggage retrieval area, as well as car rental and hotel reservation counters. Numerous advertisements are located along the walls of the ground level.

30. The American Airlines unit terminal is a two level structure with two concourses extending from the rear of the building. The main departure level contains a ticketing and baggage check-in area, as well as a bank, two restaurants, two snack counters, two gift shops, two traveler's check/cash machines, a currency exchange, duty free shop, cocktail lounge, newsstand and shoeshine stand. A duty free shop is also located on a small mezzanine above the main floor.

31. The ground floor arrivals level contains seven baggage retrieval areas, with advertising displays interspersed throughout the area. Car rental and hotel reservation counters are also located on the ground floor level.

32. Each of the main floor gate areas are served by two cocktail lounges and two snack bars.

33. The British Airways unit terminal at JFK is a compact rectangular structure with two main levels. The front portion of the outbound level provides for ticketing and baggage check-in. A back corridor area of the outbound level borders the gate positions. A passenger seating area runs the length of the rear corridor, and is bordered by two cocktail lounges, a barber shop, nursery, gift shop, duty free shop, newsstand, cookie/candy store, cafeteria, postal facility, travel insurance area, and a currency exchange. A small mezzanine level also has a lounge area.

34. The inbound level contains the baggage retrieval area and car rental and hotel reservation counters.

35. TWA maintains two unit terminals at JFK. The main level of Terminal B contains a central ticketing and baggage check-in area. Located behind the ticketing area is a mezzanine level which includes two duty free boutiques, a cocktail lounge, currency exchange, travel insurance facility, and four rotating advertising displays.

36. From the mezzanine level, two corridors lead to a large departure hall, which contains a restaurant, cafeteria, snack bar, duty free shop, gift shop, newsstand, two nurseries, and a seating area. Extending outward from

the departure hall are two concourses, each of which contains one cocktail lounge.

37. The arrivals level of TWA Terminal B includes a baggage retrieval area, as well as car rental and hotel reservation counters, a cash machine and a traveller's check machine.

38. TWA unit terminal A is a multi-leveled structure. The front portion of the departure level is occupied by the ticketing and baggage check-in area. Adjacent to the ticketing area is a sunken passenger seating area, bordered by two mezzanines. Located on the mezzanines are two currency exchanges, two duty free shops, two postal facilities, a book store, nursery, snack bar, two cocktail lounges, a restaurant, newsstand, shoeshine stand, coffee shop, and bank. A bar and snack bar is also located in flight wing no. 1, and a snack bar is located in flight wing no. 2.

39. The arrivals level includes a baggage retrieval area, rental car and hotel reservation counters, a currency exchange, travel insurance booth, and an American Express vending machine.

40. On October 17, 1987, I surveyed LaGuardia Airport for several hours. The airport consists of a main central terminal building (CTB), and three unit terminals east of the CTB.

41. The second floor of the CTB is the main departure level, and consists of a spacious central lobby area, and east and west wings. A smaller lobby area is located at the end of the west wing.

42. Five ticketing and baggage check-in areas are located on the second floor of the CTB – two between Fingers 1 and 2, and three between Fingers 3 and 4. A rear corridor runs the entire length of the east and west wings, and intersects with the main, central lobby area. Interspersed throughout the corridor and lobby areas between Fingers 1 and 2 are a bookstore, cocktail lounge, postal station, shoeshine stand, and traveler's check/cash machine. Three gift shops, a book store, newsstand, drug store, barber shop, restaurant, bank, coffee shop, postal station, and traveler's check/cash machine are located between Fingers 2 and 3. And, a cocktail lounge, shoeshine stand, gift shop, and restaurant are located between Fingers 3 and 4. Commercial and public service billboard advertisements line the walls between the fingers. Additionally, a traveller's check/cash machine, postal facility, motor vehicle display, two rotating commercial advertising displays, and a manned AIDS information table are located in the central lobby area.

43. Located at the end of each of the four fingers are a newsstand, postal facility, currency exchange, restaurant, fruit and nut stand, duty free shop, and travel insurance facility.

44. The first floor arrivals level of the CTB contains seven baggage retrieval areas which are linked by a corridor extending the length of the east and west wings. A small lobby is located in the center of the first floor. In addition to several car rental and hotel reservation counters, the arrivals level includes a bank, post office substation, and nursery, and is interspersed with commercial advertisements.

45. The third floor of the CTB has a long corridor extending the length of the building. Two corridor/lobby areas link east and west wings to the main parking structure located directly in front of the CTB. Private airline clubs, a restaurant and chapel are located on this level.

46. Eastern and Delta airlines maintain unit terminals at LaGuardia, which are located east of the CTB. The Eastern Commuter Terminal is a one level structure with a ticketing area, cafeteria, cocktail lounge, gift shop and newsstand.

47. The Eastern Shuttle Terminal consists of a departure arrivals level. In addition to the ticketing and baggage check-in area, the departure level includes a gift shop, snack bar, cafeteria, cocktail lounge, travel insurance facility, traveler's check/cash machine, and shoeshine stand. The arrivals level includes a baggage retrieval area, newsstand, cash machine, snack bar, and car rental and hotel reservation counters.

48. The Delta/Northwest unit terminal is a two level L-shaped structure. The Delta and Northwest ticketing and baggage check-in areas are located in the front portion of the main departure level. A corridor leads to a central lobby area and rear corridor, where two restaurants, two gift shops, a sports shop, bookstore, cocktail lounge, cafeteria, ice cream shop, snack bar, cash machine, flower vending machine, currency exchange, and shoeshine stand are located. The walls are lined with commercial advertisements, and four rotating advertising displays are situated in the ticketing area. A motor vehicle exhibit, encyclopedia kiosk, and post box are also located in the central lobby/corridor.

49. The arrivals level consists of a baggage retrieval area, and car rental and hotel reservation counters.

/s/ Alan J. Attias
ALAN J. ATTIAS

Sworn before me this
9 day of November, 1987

/s/ Illegible
Notary Public

Notary Public, State of Florida
My Commission Expires Sept. 22, 1989
Bonded Thru Troy Pain Insurance Inc.

EXHIBIT 1

THE PORT AUTHORITY OF NY & NJ

One World Trade Center New York, N.Y. 10048

June 1986

FACT SHEET
JOHN F. KENNEDY INTERNATIONAL AIRPORT

OPERATED BY:	The Port Authority of New York and New Jersey, since June 1, 1947 under a lease with the City of New York.
LOCATION:	In the southeastern section of Queens County, New York City, on Jamaica Bay. Fifteen miles by highway from midtown Manhattan.
SIZE:	4,930 acres (including 840 acres in the Central Terminal Area) – equivalent to all of Manhattan Island from 42nd Street to the Battery.
OPENED:	First commercial flights began July 1, 1948. The airport was formally dedicated as New York International Airport on July 31, 1948. It was rededicated on December 24, 1963, as John F. Kennedy International Airport, following action of the Mayor and Council of the City of New York and resolution by the Commissioners of the Port Authority. Construction began April 1942, when the City of New York contracted for the placing of hydraulic fill over the marshy tidelands on the site of Idlewild Golf Course, on what was to be a 1,000-acre airport.

INVESTMENT: About $60,000,000 was expended by the City of New York on original construction. Through June 30, 1984 the Port Authority has invested approximately $781,554,000 at the airport.

EMPLOYMENT: In 1985, the airport provided employment for 41,700 people.

RUNWAYS: The runway system consists of two pairs of parallel runways (4L-22R, 4R-22L and 13L-31R, 13R-31L) aligned at right angles. A fifth runway, General Aviation Runway 14-32, serves private, business and commuter airline flying only. Total runway length is nine miles.

Runways 4R-22L and 4L-22R are operated as a parallel runway system. Runway 4R-22L is 8,400 ft. by 150 ft., and Runway 4L-22R is 11,352 ft. by 150 ft. wide.

Both ends of Runway 4R-22L are equipped with Instrument Landing Systems (ILS), Approach Lighting Systems (ALS) with sequenced flashers, and touchdown zone lighting; the runway also is equipped with centerline and edge lighting, and high speed taxiway exit lighting. Take-offs are permitted with visibility of 1/8 mile. Runway 4R is a Category II Runway permitting landings with visibility lower than 1/4 mile; (FAA is installing equipment to permit Category IIIa landings, by early 1982); 22L landings are conducted

with visibility less than 1/2 mile. Runway 4L-22R is equipped with ILS at both ends, and edge and centerline lighting; with a Visual Approach Slope Indicator System (VASI) for Runway 22R approaches. The 4L end is equipped with a Runway End Identifier Light System (REILS). Instrument landings are permitted at both ends, and takeoffs are permitted with 1/8 mile visibility. Both runways have been grooved to improve skid resistance and minimize hydroplaning.

Runways 13L-31R and 13R-31L – also operate as a parallel runway system. Runway 13L-31R is 10,000 feet by 150 feet and Runway 13R-31L is 14,572 feet by 150 feet. Both have edge and centerline lighting.

Both ends of Runway 13L-31R are equipped with ILS. The 13L end is a Category II runway, equipped with approach lights, a VASI and a lead-in lighting system (LBIN). Landings on 13L are permitted with visibilities as low as 1/4 mile, and takeoffs with visibilities as low as 1/8 mile. Runway 31R has an approach lighting system permitting landings with 1/2 mile visibility, and takeoffs with one-eighth mile visibility. The runway is grooved for added traction in wet weather.

In the case of Runway 13R-31L, the Runway 13R end is equipped with a

VASI and LDIN, while the Runway 31L end is equipped with an ILS, permitting instrument landings.

The alignment of the two parallel runway combinations (4R-22L/4L-22R and 13R-31L/13L-31R) permits landings on one runway during instrument conditions while takeoffs are being made on the parallel runway. This materially increases capacity of the airport and reduces landing and takeoff delays. All runway exists are provided with elevated blue edge lights.

GA Runway 14-32 has been established along a section of Taxiway "E". This runway, 2,560 feet long by 75 feet wide, commissioned for aircraft weighing less than 12,500 pounds, is usable for both day and night flying. Medium intensity runway edge lights are provided.

TAXIWAYS: Taxiways total 22 miles in length. Standard width is 75 feet, with 25 feet heavy duty shoulders and 25 feet erosion control pavement on each side. The taxiway centerline light system has largely displaced the edge light system previously used. Taxiways are generally of asphaltic concrete or lime, cement, flyash (LCF) composition 15 to 18 inches thick. A sign system, illuminated at night, provides directional information for taxiing aircraft.

BUILDINGS:

Central Terminal Area

Consists of eight airline passenger terminals and the International Arrivals/Wing Buildings complex in the center of the airport, surrounded by a dual ring of peripheral taxiways. Initially 655 acres, its area was enlarged to 840 acres by relocation of the taxiways to provide space needed for expansion of the passenger terminals.

There are about 150 aircraft gate positions serving the various terminals. The number can vary with the type and size of aircraft in use.

The Central Terminal Area facilities also include a 10-story airport control tower, central heating and air-conditioning plant, Tri-Faith Chapel plaza, parking for over 6,600 autos, and an auto service station. (There are a total of 13,000 public parking spaces at the airport including the Central Terminal Area, employee lot and long-term lot.)

Air Cargo Center

Consists of 23 cargo handling and cargo service buildings, two hanger/cargo buildings, an Animalport operated by the ASPCA, and a U.S. Post Office Airport Mail Facility (see below).

Aircraft Service Facilities

Thirteen aircraft hangars; Pan American engine overhaul building; 32 million gallon aircraft fuel storage facility; fuel truck garage. An additional hangar for Eastern Air Lines is under construction.

Airport Administrative Facilities

Port Authority office and maintenance building; Port Authority Police and Operations Building; Satellite Police Garage; Telephone Central Office; Medical Building; Water Pumping Station.

Other Facilities

International Hotel (520 rooms); three rental car service buildings; Carey Transportation bus garage; Federal Office Building; Citibank building; seven food production centers; Flying Tiger's office building. The airport has over 32 miles of roadways. A large new airport mail facility has been built by the U.S. Postal Service in the North Cargo Area.

UNITED STATES-FLAG SCHEDULED AIRLINES:
Air Atlanta
American Airlines
Arrow Air
Delta Airlines
Eastern Airlines
Empire Airlines
Northwest Orient Airlines
Pan American World Airways
Redmont-Henson
Republic

Tower Air
Transamerica Airlines
Trans World Airlines
United Airlines
USAir
Western Airlines

FOREIGN-FLAG SCHEDULE AIRLINES:
Aer Lingus
Aerolineas Argentinas
Aeromexico
Aero Peru
Air Afrique
Air France
Air India
Air Jamaica
ALIA Royal Jordanian Airlines
Alitalia
ALM
Aviance (Columbia)
British Airways
British West Indian Airways
British Caledonaian
C.A.A.C.
Cayman Airways
China Air
Czechoslovakian Airlines
Dominicana (Dominican Republic)
Ecuatoriana
Egypt Air
El Al Israel Airlines
Finnair
Guyana Airways
Iberia
Icelandair
Japan Air Lines
KLM Royal Dutch Airlines
Korean Airlines
Kuwait

Lan-Chile
LOT-Polish
Lufthansa German Airlines
Nigerian Airways
Olympic Airways
Pakistan International Airlines
Royal Air Maroc
SABENA-Belgian World Airlines
SAS-Scandinavian Airlines Systems
Saudia
South African Airways
Swissair
TAP (Air Portugal)
TAROM Romanian Airlines
VARIG Airlines (Brazil)
VIASA Airlines (Venezuela)
Yugoslav Airlines

CARGO ONLY DOMESTIC & FOREIGN:
Aeromar
Aeronaves Del Peru
Air Express International
Airborne Express
Air Canada
Arrow Airways
Cargo Lux
Caribbean Air Cargo
D.H.L. Airlines
Emery
Federal Express
Flying Tiger Lines
INNAIR
Spirit of America
Summit Airlines
TAB Transports (Aero Bolivia)
Transamerica

SUPPLEMENTAL AIRLINES (U.S. & Foreign):
Aerostar
American Transair
Balair
British Air Tours
Condor Air Service
Five Star
LTU (Lufttransport Unternehmen)
Martin Air
Minerve
Spantax S.A.
Susquequehanna

COMMUTER AIRLINES:
Allegheny Commuter
Bar Harbor Airlines
Command Airways
East Coast
Jet Express
Pilgrim Airways
Precision
Ransome Airlines

HELICOPTER AIRLINES:
New York Helicopter

AIR TRAFFIC:

	1949	1982	1983	1984	1985
Movements	18,115	290,000	304,322	308,000	286,076
Passengers	222,620	26,453,000	27,904,474	30,000,000	28,945,288
Air Cargo (tons)	4,580	1,113,000	2,245,757	1,250,000	1,080,354

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* First Year of Port Authority Operation
Estimated

ELECTRICAL POWER:

a) 281,000 KVA total-4 sub-stations
b) Main feed to Airport from Con Edison (Jamaica & Brooklyn Plants-fourteen 27KV feeders)
c) Runway lighting and taxi-way centerline lighting adjustable to five degrees of intensity
d) Emergency generator backup provided for critical runway and taxiway lighting and navigational aids

CENTRAL HEATING & REFRIGERATION PLANT:

a) Hot Water – 380-400 F, 250#-330# pressure
b) Chilled Water – 45 F, supply, 55 F return
c) Generator Capacity – 280,000,000 B.T.U.
d) Refrigeration Capacity – 18 units produce 22,450 tons
e) Two 210,000 gallon fuel oil storage tanks
f) Two 10,000 gallon fuel oil day tanks

DOMESTIC WATER SUPPLY:

3,000,000 gallons per day

AVIATION FUEL:

a) Storage Capacity – 32 million gallons
b) 62 tanks in bulk storage and 40 tanks in Satellite
c) 50 miles of underground pipe
d) Five piers
e) Computerized transfer of fuel – capable of handling 27 different types of fuel
f) Fuel Tank Farms protected by high pressure foam systems

* * *

EXHIBIT 2

THE PORT AUTHORITY
OF NY & NJ
One World Trade Center
New York, N.Y. 10048

November 1986

FACT SHEET
LA GUARDIA AIRPORT

OPERATED BY: The Port Authority of New York and New Jersey, under a lease with the City of New York, since June 1, 1947.

LOCATION: In Borough of Queens, New York City, bordering on Flushing Bay and Bowery Bay. Eight miles from mid-Manhattan.

SIZE: 650 acres.

HISTORY: Site was first occupied by Gala Amusement Park. Transformed in 1929 into a 105-acre private flying field, it was first named Glenn H. Curtiss airport and later North Beach Airport. Taken over by New York City, it was enlarged by purchase of adjoining land and by filling in 357 acres of waterfront along the east side.

Ground was broken on September 9, 1937 for a new airport, which was built jointly by the city and the Federal Works Progress Administration. It was dedicated on October 15, 1939 and was opened as LaGuardia Airfield to commercial traffic on December 2nd of that year.

In 1947, the year the airport was leased to the Port Authority, it was named LaGuardia Airport. A large new Central Terminal was opened in 1964 and enlarged in 1967.

INVESTMENT: Original construction by City of New York cost $40 million. As of June 30, 1984, the Port Authority had invested $301.2 million in development of the airport, which included $48 million from U.S. and State agencies.

EMPLOYMENT: In 1985, there were 10,339 persons employed at the airport.

PASSENGER TERMINALS: Central Terminal Building: Dedicated April 17, 1964. This terminal serves most scheduled airlines. It is 1,300 feet long and 125 feet wide, with 650,000 square feet of floor space. The $36 million, six-block-long structure consists of a four-story central section, two three-story wings, and four two-story arc fingers leading to 36 aircraft gate positions.

Eastern Airlines/Shuttle Terminal: In March, 1981, the new Shuttle Terminal was opened to the public adding eight gate positions to handle aircraft. The cost of the new terminal was approximately $25 million. Hourly shuttles are flown between New York, Washington, Boston, and Buffalo.

Eastern Airlines Commuter Terminal – Hangar 8: Upon the opening of the

Shuttle Terminal in 1981, the commuter airlines were relocated to the adjacent Hangar No. 8. The hangar, which was previously utilized for aircraft maintenance, was converted for use as a commuter airline terminal. It now serves four commuter airlines, NY Helicopter, and is operated by Eastern Airlines.

Delta Airlines Terminal: Constructed by Delta Airlines at the east end of the airport, it opened in June, 1983. The terminal has eight gate positions to handle aircraft traffic. The cost of the new terminal was approximately $86 million. Northwest and Business Express are also located in this terminal.

Marine Air Terminal: Once named the Overseas Terminal, this was the original airport terminal building, placed near the bay to serve the era's flying boats. It is two stories and domed, with an interior rotunda. It is used by commuter airlines, air taxis, private aircraft, Butler Aviation (fixed base operator) and the U.S. Weather Service. On September 18, 1980, the James Brooks mural entitled "Flight" which was originally completed in 1942 was rededicated by the Port Authority. On October 1, 1986, Pan Am opened its new shuttle operation in its new addition to the Marine Air Terminal. The new terminal section houses four aircraft gates

from which Pan Am operates hourly shuttle service to Boston and Washington.

CONTROL TOWER: The 150-foot high control tower was activated in May, 1964.

PARKING GARAGE: Completed at the end of 1976 at a cost of $30 million, the five-level structure can accommodate approximately 2,600 cars. In addition to ground level access to the Central Terminal Building, there are two elevated sheltered walkways equipped with moving sidewalks.

An alternate exist roadway leading to 94th Street and Grand Central Parkway from the Garage Plaza was completed in September, 1983. The roadway alleviated congestion on the airport roadways in the passenger loading zone areas at that time.

OTHER STRUCTURES: Fuel Storage Facility: Eight above-ground tanks and six below-grade tanks, with total capacity of approximately 5,130,000 gallons. Fuel delivered by pipeline from supply sources in Linden, New Jersey. Operations began 1975.

Nine Hangars: Used for aircraft maintenance and other purposes and Port Authority administration offices.

Police Building, including Emergency Garage. During the spring and summer of 1986, the Police Building was redesigned and underwent new construction which resulted in major

improvement including expanding office space and Emergency Garage space. This construction is expected to be completed by the end of 1986.

Other structures are the airport mail facility, air cargo, garaging, maintenance, food preparation and marine and aircraft simulation equipment.

RUNWAYS: There are two main runways, each 7,000 feet long.

In a $40 million project completed in 1967 by the Port Authority, both runways were extended over water to 7,000 feet (by 150 feet wide). The extensions are built on a 50-acre L-shaped pier ranging in width from 700 to 900 feet. The northerly 2,000 feet (by 150 feet wide) extension to Runway 4-22, complete with taxiway and holding pad, was built into Flushing Bay and opened to air traffic in March, 1966. Similarly, the 5,965 foot Runway 13-31, with its parallel taxiway, was extended westward into the Bay to 7,000 feet (by 150 feet wide) and opened to air traffic in November, 1966. Two 3,000 foot long piers were constructed beyond the ends of the runway extensions to support an Approach Lighting System with sequenced flashers. A ship channel was dredged between Rikers Island and South Brother Island to replace the channel which was closed. It is maintained by the Federal government.

Runway 4-22 – Bi-directional instrument runway has category II capability. It is grooved and is equipped with centerline and edge lighting. Takeoffs are permitted with visibility as low as 1/8 mile, and landings on Runway 22 with visibility as law as 1/4 mile. Navigational aids in the 22 approach include an Instrument Landing System (ILS), and Approach Lighting System (ALS), Touchdown Zone Lighting (TDZ), Runway End Indicated Light System (REILS), and Visual Approach Slope Indicator System (VASI). Runway 4 is equipped with an ILS and a SSALR Approach Lighting System.

Runway 13-31 – Equipped with REILS at both ends, an ILS, an Approach Lighting System (SSALR) serving Runway 13, a VASI-16 (3-bar for wide bodied aircraft) system serving Runway 31, and conventional VASI serving Runway 13. The runway is equipped with centerline and edge lighting, and is grooved for added traction during wet weather. Take-offs are permitted with visibility as low as 1/8 mile, and landings on Runway 13 with visibility less than 1/2 mile.

TAXIWAYS: The taxiway system to the east of Runway 4-22 has been reconfigured to meet clearance demands of wide-bodied aircraft, except for Taxiways

"F" and "D" between "BB" and "B", "B" between "C", "D" and "F". All taxiways are now equipped with centerline lights. Ninety percent have edge lights on turns.

Construction began in the fall of 1986 to establish a new Taxiway "CC" between Taxiway "BB" and "E" which will run parallel to Taxiway "BB". Completion is targeted for end of December, 1986.

TRAFFIC:	1948*	1981	1983	1985
Plan Movements	145,444	308,205	324,176	348,053
Passengers	2,709,178	18,146,191	18,813,397	20,406,696
Air Cargo (tons)	34,491	36,778	38,983	54,093
Air Mail (tons)	12,142	43,467	50,606	62,659

(Traffic figures reflect commercial passengers only, excluding helicopter traffic).

* First full calendar year of Port Authority Operation.

EXHIBIT 3

THE PORT AUTHORITY
OF NY & NJ
One World Trade Center
New York, N.Y. 10048

June 1986

FACT SHEET
NEWARK INTERNATIONAL AIRPORT

OPERATED BY: The Port Authority of New York and New Jersey, under a lease with the City of Newark dated March 22, 1948.

LOCATION: In Essex and Union Counties between the New Jersey Turnpike (accessible from Exits 13A and 14) and U.S. Routes 1 and 9, about 16 miles from midtown Manhattan.

SIZE: 2,300 acres, of which 880 were acquired by the Port Authority since it began operation of the airport in 1948.

OPENED: October 1, 1988.

HISTORY: The metropolitan region's first major airport was begun by the City of Newark on 68 acres of swamp, and quickly became the world's busiest commercial airport. During World War II, it was operated by the Army Air Corps. Afterward in 1947, the Port Authority assumed responsibility for operation and development. The Port Authority added an instrument runway, a new terminal building and an air cargo center. Traffic grew steadily. A large-

scale Redevelopment Program began with site preparation in 1963. Two new terminal buildings began operation in 1973; completion of a third was temporarily deferred. A new 8,200-foot Runway 4L-22R was commissioned in 1970; a rebuilt and extended (9,800 feet) Runway 4R-22L was reopened in 1973. Other new construction includes the Administration Building, Central Heating and Refrigeration Building, a new Fuel Storage Tank Farm, and new taxiways and roadways.

INVESTMENT: The City of Newark spent over $8,200,000 on construction and development of the airport; the United States Government spent over $15,100,000 prior to 1948. By year end 1984 the Port Authority had invested over $500,000,000 at the airport.

EMPLOYMENT: Approximately 12,700 people were employed at the airport in 1985.

CENTRAL TERMINAL AREA: Within a 425-acre oval arrangement are Terminals A and B; each measures 800 by 165 feet and branches out to the three satellite aircraft gate buildings. Each main building has an upper departure level with facilities for airline ticketing; a lower arrival level for airline baggage claim and ground transportation, and a ground parking level extending under the arrival and departure roadways and the main

building itself. The concourse level, for circulation and passenger service, is halfway between upper and lower levels, and contains eating facilities, retail stores and other patron services. At the circular satellites, an upper level contains flight departure rooms and airline and patron service facilities; the lower level is used for airline operations activities. There are 55 operational aircraft gates.

Now open in Terminal C, is a new International Arrivals Facility. With two aircraft gate positions and related terminal space, it houses the airport's Federal inspection services. The remainder of Terminal C is operated by PEOPLExpress.

The 14 miles of CTA roadway provide convenient access to each airline-terminal and to more than 18,500 parking spaces (airport wide) – hourly, daily and long-term reduced rate. Separate arrival and departure roads, each at an elevation corresponding to the two main levels, are tied into an express loop, to allow traffic to bypass terminals. A centralized car-rental facility is adjacent.

Ancillary facilities include a large aviation fuel storage area with a tank capacity of approximately 10,000,000 gallons, fed by an underground fuel pipeline from refineries at Linden, New Jersey.

Aircraft are supplied through an underground fuel distribution system to the terminal aprons. The Central Heating and Refrigeration Plant supplies heat, hot water and chilled water for air conditioning to the Central Terminal Area.

A first-class hotel for Newark International – completed by a Marriott Corporation has been erected on a 13-acre site in the Central Terminal area. The ten-story building has 414 rooms (expandable to 600) and banquet and convention facilities. It was officially opened in late June 1986.

The Central Terminal Area was built as part of the Newark International Airport Redevelopment Program. Site preparation began in September 1963, with construction of a wide, four-mile drainage ditch around the airport perimeter, to direct storm water from the airport and adjoining communities into Elizabeth Channel. Construction of Terminals A and B began in October 1967; their shells were completed in 1972; the airlines began operations in Terminal A on August 8, 1973, and in Terminal B in September 1973. A new 8,200-foot Runway 4L-22R was commissioned in March 1970; Runway 4R-22L, rehabilitated and extended to 9,800 feet, was reopened in August 1973.

NORTH TERMINAL: The airport's former passenger terminal building, now called the North Terminal, was originally opened in July 1953. PEOPLExpress, and numerous supplemental carriers are now based in the 576 by 166 foot building. There are automatic baggage conveyors, coffee shop and bar, gift shop and book shop, and all other necessary patron facilities, including more than 800 hourly parking spaces directly in front of the building. Some 3,200 daily and long-term parking spaces are available in nearby Lots 2, 3 and 4.

CONTROL TOWER AREA: Control Tower: Structure of the $1,500,000 tower was completed in July 1959. Instrumentation by the Federal Aviation Administration was completed in January 1960.

Port Authority Administration Building was completed in September 1975. The $8-1/2 million, four-level modernistic structure centralizes most of the airport's staff, and houses the airport's emergency response fleet.

OTHER BUILDINGS: Air Cargo Center: Four buildings, including three cargo terminal buildings and one cargo service building, completed for $3.4 million in December 1959.

Cummins Diesel Industrial Building, completed in March 1958

United Airlines two-bay, $3 million hangar was completed in March 1958.

Also constructed since 1948 are utility, equipment and storage buildings, a flight kitchen and a fuel storage area in the northern part of the airport.

Built prior to Port Authority operation are: Air Mail and Express Building, formerly the airport administration building and passenger terminal.

Triple hangar, 1,100 by 175 feet.

Butler Aviation Hangar (for general aviation)

Medical Building

U.S. Postal Facility – A $2,600,000 Postal facility is open at NIA. This 1,010,500 square foot building contains the latest in automated mail processing equipment. It is located in the southwest corner of the airport.

Newark Turbine Service Center – Butler Aviation will build and operate the service center which will provide all services required by operators of turbine powered aircraft. It will include an expansive terminal and a complete one-stop turbine aircraft maintenance facility.

Construction of a new multi-tenant air cargo building is underway at

the site of the old fuel farm at a cost of $5.1 million. Completion of this new facility is scheduled for July 1, 1985.

Federal Express Metroplex – Federal Express is constructing a $30,000,000 Metroplex on 27-acres at the south development area of NIA. It will triple the size of Federal's present package handling installation and more than double Federal's work force at NIA.

RUNWAYS:

Runway 4R-22L: 9,800 ft. long by 150 ft. wide. It is the prime landing runway, fully instrumented for operations during Category II conditions. Runway 4R is equipped with the latest state of the art, solid-state electronics, Category II Instrument Landing System (ILS) and a full 2,400 ft., Category II configuration, Approach Lighting System with sequenced flashers (ALSF). A Category I ILS and Approach Lighting System on Runway 22L is included. There are edge, centerline and touchdown zone lighting systems, and centerline lighting on four high-speed exit taxiways. The runway is grooved for improved traction in wet weather. Take-offs are permitted with visibility as low as 1/8 mile. Runway 4R landings are conducted with visibility less than 1/4 mile, and 22L

landings with visibility less than 1/2 mile.

Runway 4L-22R: 8,200 ft. long by 150 ft. wide, commissioned in March 1970, is 950 ft. west of the parallel Runway 4R-22L. Navigational Aids include an ILS and Approach Lighting System on Runway 4L, while Runway 22R is equipped with a Visual Approach Slope Indicator System (VASI) and a Runway End Identifier Light System (REILS). It is grooved for its full length and width. Take-offs are permitted with visibility as low as 1/8 mile, 4L landings are conducted with visibility less than 1/4 mile.

Both runways have displaced thresholds to minimize noise effects. High intensity runway edge and centerline, as well as higher speed exist taxiway centerline lighting on taxiways complete the visual aids package.

Runway 11-29: 6,800 ft. long and 150 ft. wide, and equipped with VASI at both ends and REILS at Runway 29 end, and edge lights. Runway is grooved for added traction in wet weather.

TAXIWAYS: More than 12 miles of 130-foot wide taxiways, almost entirely equipped with centerline lighting, link the three runways with the central and north terminal passenger and cargo

areas. These have 25-foot, heavy duty shoulders and 22.5-foot erosion control pavement on each side.

CERTIFIED AIRLINES:

American Airlines
Continental Airlines
Delta Airlines
Eastern Airlines
Empire Airlines
Midway Airlines
Midwest Express Airlines
New York Air
Northwest Airlines
Pan American World Airways, Inc. (Helicopter Service)
PEOPLExpress, Inc.
Piedmont Airlines
Regent Air
Trans World Airlines
United Airlines
USAir
Virgin Atlantic Airways
World Airways

COMMUTER AIRLINES:

Air Virginia
Brockway Air
Holiday Airlines
Jetstream International
Mall Airways
New Air
New York Helicopter
Pennsylvania Commuter
Pocono Airlines
Precision Airlines
Ransome Airlines
Suburban Airlines (Reading Aviation)
Susquehanna Airlines

CARGO AIRLINES:	Airborne Express Federal Express Corporation Flying Tiger Line Summit Airlines Viking International Zantop International Airlines

AIR TRAFFIC:	1949*	1982	1983	1984	1985**
Plane Movements	93,463	198,453	268,186	345,171	379,738
Passengers (Commercial)	834,916	11,731,062	17,411,253	23,654,163	28,576,586
Air Cargo (tons)	40,574	122,492	179,167	227,978	274,116
Air Mail (tons)	2,891	42,306	41,573	45,670	40,914

* First Full Calendar Year of Port Authority Operation

** Estimated

EXHIBIT 4

PORT AUTHORITY CAPITAL PROGRAM 1987-1991

MARCH 1987 THE PORT AUTHORITY OF NY & NJ

Prepared by The Government, Community &
Public Affairs Dept.
THE PORT AUTHORITY OF New York & New Jersey
One World Trade Center, 68W, New York, NY 10048

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Charles L. Hirsch, *Executive Assistant to the Executive Director*

SUMMARY

The past decade has marked an impressive economic turnaround for the New York-New Jersey metropolitan area, with population, employment growth and new public and private sector development still gaining momentum. Through this pivotal era, the region has relied heavily on the efficient performance of the Port Authority's vital transportation systems and its ability to finance their renewal and improvement as state and local governments have moved from fiscal crisis to fiscal health.

To sustain and expand the benefits of regional growth, The Port Authority of New York and New Jersey has proposed to both states a comprehensive capital investment strategy to rehabilitate and expand its core transportation facilities, and to fulfill the economic development commitments proposed in 1978 when the agency responded to the need for new investment to help rekindle commercial development and infrastructure renewal in the Port District. The proposed capital program elements for the next five years total more than $5.8 billion, of which approximately $4 billion actually would be expended from 1987 through 1991, with additional spending for some projects which will not be completed until the mid-nineties.

This is a strategic agenda for an economically unified region which must address expanding local transportation needs and intensifying worldwide competition. The goals of the capital program are –

- To upgrade and expand the interstate linkages in the roadway and transit networks on which the region relies for moving people

and goods throughout the bi-state Port District:

- To expand the passenger-and cargo-handling capacity and improve the level of service at the region's airport system, responding to growing demand and emerging competition from other metropolitan aviation "gateways;"

- To modernize the terminals, channels, and related facilities of the bi-state port in light of maritime-industry changes and competition from other Atlantic coast harbors;

- To carry out the maintenance and rehabilitation projects essential to assuring safe, reliable, and efficient operation of many vital but aging Port Authority transportation facilities, generally without interrupting service.

- To stimulate private-sector investment and job creation, especially in business sectors that relate closely to the Port Authority's basic functions or that enhance the region's role as a center of world commerce, and in communities that have not yet shared fully in the region's economic renewal.

The new capital strategy incorporates and expands upon several previously announced agency capital programs including substantial renewal of the PATH system, modernization of maritime terminals and deepening of harbor channels, construction of new economic development projects in both states, and agencywide rehabilitation projects at vehicular crossings and other Port Authority facilities. The program also includes funds for

the completion of regional development and bus purchase programs undertaken pursuant to earlier agreements with the two states.

Many of the projects outlined in this summary have already been discussed publicly by the agency. Some already are underway. New initiatives proposed in this document include –

- Investment in PATH's Newark to World Trade Center service to accommodate trains up to 10 cars in length as demand warrants (8-car trains already are scheduled to be in service in 1988);

- Capital investment by the Port Authority to permit introduction of new passenger-only commuter ferry service between Hoboken and Battery Park City;

- Capital support for a new exclusive bus lane feeding the Lincoln Tunnel to relieve congestion on the existing "XBL," in conjunction with other New Jersey Transportation agencies;

- Reconfiguration of the central terminal area at JFK International Airport to improve ground circulation, baggage handling, and other services in anticipation of growing passenger volumes projected to the Year 2000;

- Commencement of comprehensive on-airport circulation improvement and parking expansion at Newark International Airport, including upgraded connections with local rail services;

- Development of additional terminal facilities at the east end of LaGuardia Airport, to

improve its ground circulation and passenger capacity.

This is the most ambitious capital program ever outlined for the Port Authority. Even so, it is but one component of an unprecedented level of public-sector infrastructure investment in both states projected for the coming decade. During this period, estimated capital investment by state and local governments and transportation Authorities may approach $60 Billion, including $8.3 billion by the Metropolitan Transportation Authority, $3.5 billion by New Jersey Transit and the New Jersey Department of Transportation, and $30 billion by the City of New York.

Unlike some of these other governmental entities, the Port Authority's system of facilities must be self-supporting and the agency does not have the power to tax, pledge the states' credit, or draw most on federal capital grant programs. While commercial tenants share in the costs of some facility improvements under lease arrangements, implementation of the program depends on availability of adequate revenues from tolls, fares, other user charges, and rents to support both operating costs and debt service on Port Authority bonds – those currently outstanding and those issued to support the capital program.

Capital Program Summary 1987-1991
(in millions)

Interstate Transportation System		
PATH Improvement Program[1]	760	
Hudson River Tunnels, Bridges & PABT System Improvement	380	
PATH Station Improvements and Additional Cars	70	
Hoboken/Battery Park City Ferry Service	150	
Staten Island Bridge Improvements[2]	65	
Holland/Lincoln Tunnel Busway	25	
Manhattan CBD Distribution Improvements	25	
		1,475
Aviation		
JFK 2000[3]	900	
Other JFK	330	
Newark 2000[4]	650	
Other Newark	210	
LaGuardia	320	
		2,410

[1] Includes expansion to 8-car trains, Newark Service, and 7-car trains, JSTC/33rd St. Service.

[2] Includes up to $20 million for preliminary stages of possible SIB Expansion

[3] Total Project Cost: $2.7 Billion

[4] Total Project Cost: $1.35 Billion

Economic Development		
Waterfront Development[5]	175	
Resource Recover	300	
Industrial Parks	75	
		550
World Trade		110
Port		
Newark & Elizabeth	250	
Howland Hook	90	
Dredging	60	
Other Projects	110	
		510
Allocation for Regional Development Projects		150
Allowance for Projects in Development		225
TOTAL		$5,430
Balance – Bus Program		50
Balance – Bank for Regional Development		235
Provision for Emergency Repairs		70
TOTAL CAPITAL PLAN		$5,785

I. INTRODUCTION

Early last year, the Port Authority reported that the agency anticipated committing more than five billion dollars in capital investments by 1991 to continue the modernization and expansion of its core transportation facilities and to continue the program of regional economic development projects already authorized by the states of New York and New Jersey.

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[5] Total Project Cost: $250 Million

After intensive analyses of regional needs and facility requirements, the Port Authority recommended to the Governors the capital investment strategies essential for providing adequate, cost-effective services fulfilling the authority's regional mandate.

This is a comprehensive capital investment agenda. It derives directly from the need to serve, sustain, and expand the strong economic growth trend now evident in most parts of the 17 – county area directly served by the Port Authority.

This growth already is taxing the capacity of vital regional transportation links operated by the agency and is underscoring the urgency of rehabilitating its oldest facilities. The surface transportation, maritime, and airport complexes operated by the Port Authority are among the region's most vital economic assets. Should they become inadequate or uncompetitive with other regions' transportation systems, the metropolitan area's growth would falter.

For the region, the Eighties have brought record employment levels, massive new commercial development in the suburbs as well as in Manhattan, and new concentrations of residential development in both states. The region has strengthened its position as a corporate headquarters, a world financial capital, and an incubator of growth companies in many business sectors.

At the Port Authority's diverse facilities, these gains have translated into successive annual record in traffic at its vehicular crossings, full use of its public transit facilities during commuting hours and record volumes of airport use and port cargo tonnage.

The Port Authority, business observers, and other analysts foresee continued gains in the regional economy – attended by further growth in use of Port Authority facilities – through the decade and perhaps beyond. Another trend gathering momentum is the increasing economic integration of the bi-state metropolitan area, broadening the labor, land, and market base of the region's private sector economy.

However, the region and the Port Authority quickly could become the victims of their own economic success, and of the aggressive efforts of other regions to capture the New York-New Jersey metropolitan area's pre-eminent share of the nation's commercial and transportation activity.

Parts of the trans-Hudson roadway system have reached capacity during peak periods, and the PATH Newark-Lower Manhattan service and Lincoln Tunnel-exclusive bus lane systems are at capacity during the peak hour. Congestion on roadways and crossings is impeding efficient trucking services, on which the region relies for virtually all its good-movement needs. These systems cannot absorb forecast growth in trans-Hudson demand to 1990 without additional peak period capacity, especially on transit service.

The Port Authority's Staten Island-to-New Jersey crossings, while not yet exhibiting the degree of chronic peak-period congestion of the trans-Hudson crossings, are showing very strong traffic growth. These bridges serve rapidly growing local needs on Staten Island and in central New Jersey, as well as a larger regional market.

Economic and traffic forecasts point toward future congestion problems on this system.

In 1986, costs exceeded revenues by an estimated $85 million on the Port Authority's Trans-Hudson system, which includes the six vehicular crossings, PATH, several terminal facilities, and the agency's bus program. At present toll and fare levels, operating losses on the system are projected to continue and grow despite some anticipated growth in patronage. Increasing maintenance and operating costs account for this trend.

JFK and LaGuardia airports are handling twice the passenger levels for which they were designed, and Newark has become the nation's fastest growing major airport. On-airport circulation and off-airport ground connections are inadequate at all three facilities. Meanwhile, competing air gateways are emerging as airline industry changes and multi-billion dollar airport investments in other regions threaten this area's long-term dominance as an international air hub.

The bi-state port, in an era of transportation deregulation and heightened competition, faces similar challenges. The containerport facilities pioneered by the Port Authority here are more than 20 years old and not fully suited to the needs of larger new vessels and a transformed maritime industry as compared with newer facilities served by deeper channels being developed in other Atlantic ports with the explicit goal of capturing cargo that now moves through this harbor. Inadequate depths in port channels here already are circumscribing operations of larger vessels.

Finally, the region's resurgence may be undercut by the persistence of economic decay and high unemployment in some of its older communities, even as its Manhattan commercial core and outer suburbs begin to exhaust their resources of available land and labor force in the years ahead. The Port Authority's existing facilities and development plans are heavily concentrated in these distressed areas.

The Port Authority, with a unique regional role and perspective, has identified an extensive agenda of potential capital investments to address these compelling needs. The capital strategy it has proposed to the two states reflects a single agenda for an economically unified region. Consistent with existing state authorizations, it focuses on the modernization and selective expansion of the agency's core transportation facilities in both states.

This is an ambitious program. In terms of passenger volume, the proposed investments in the region's three major airports are roughly equivalent to building a major international airport from scratch. The new Trans-Hudson transit initiatives add the substantial peak-period capacity needed to stave off regional gridlock. The unprecedented investment in harbor channel dredging responds to changing Federal policies and is an essential complement to the extensive modernization of the port's largest containerized cargo-handling facilities. The economic development projects are breakthrough investments on under-utilized sites.

Timely and cost-effective implementation of the program depends upon cooperation from elected officials, state agencies, localities, other public authorities, and

regional business and labor leaders. The project plans include attention to improved safety and security, patron and community concerns, sensitivity to environmental quality issues, and new approaches to leveraging local economic benefit for communities and residents throughout the region.

Port Authority capital planning reflects long-range forecasts, interagency consultation, and periodic revisions in the number, scale, schedule and cost estimates of its projects as changing conditions sometimes require. The overall program, portions of which already have been announced, is reviewed in this summary for each major business area of Port Authority operations.

II. SUPPORTING REGIONAL DEVELOPMENT: THE PORT AUTHORITY MISSION

The Port Authority of New York and New Jersey, chartered in 1921 under an interstate legislative compact, has provided the framework for cooperative development of vital regional transportation systems that serve residents and businesses in both states. Through its 65-year history, it has pioneered transportation innovations that have supported the region's emergence as the nation's preeminent metropolitan area and a world capital of commerce.

The agency's charter defines its operating area as a Port District whose boundaries approximate a circle 25 miles in radius centered on the Statue of Liberty and including all or part of 17 counties in both states. The agency is led by a 12-member Board of Commissioners, six appointed by each Governor. Annual agency budgets

are subject to review and approval of the Governors, and the bi-state compact, subsequent legislative authorizations, and bond covenants outline the powers and limits of the authority.

Beginning with the tasks of expanding interstate vehicular transportation connections and coordinating port development, the agency has taken on at the states' direction development of a regional airport system, facilities to serve interstate commerce, specific public transportation services and facilities, and, most recently, targeted economic development and infrastructure renewal projects.

The agency has functioned by statute on a self-financing basis, first selling bonds supported by individual projects, later shifting to bonds backed by consolidated revenues from its facilities and operations. This has enabled the agency to expand the region's transportation and commercial infrastructure by marshalling the potential of its existing revenue-producing facilities to meet successive regional development needs. Expansion into new business areas as directed by the two states has been feasible without taxpayer subsidy. Consistent financing of repair and expansion at older facilities has been undertaken as conditions have required.

The agency's interstate transportation network – the Trans-Hudson system – includes the Holland and Lincoln Tunnels and the George Washington Bridge crossing the Hudson, the Bayonne and Goethals Bridges and Outerbridge Crossing linking Staten Island with New Jersey, the PATH rail transit system, the Port Authority Bus Terminal, George Washington Bridge Bus Station, Journal

Square Transportation Center, and other support facilities.

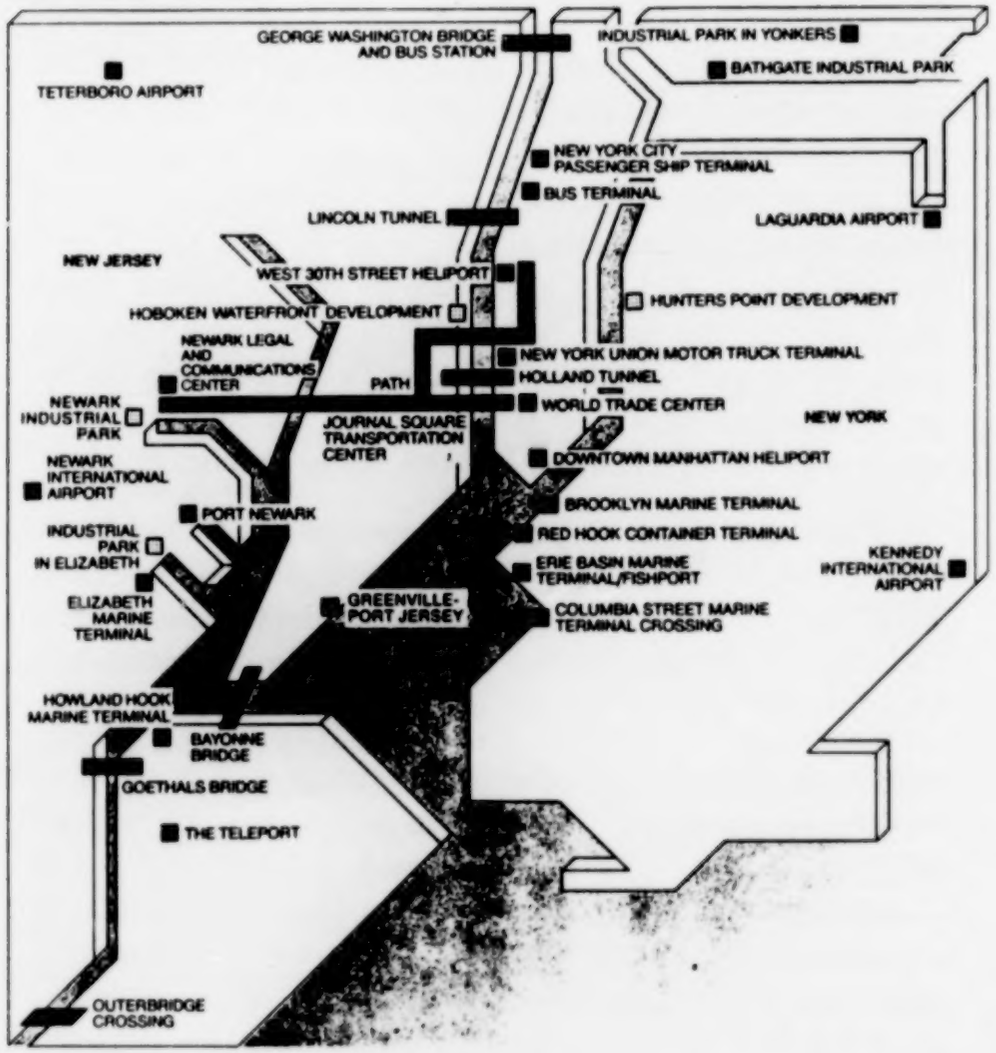
The authority's Aviation Department operates JFK International Airport; Newark International Airport; and LaGuardia Airport; Teterboro Airport, a general aviation facility; and two heliports in Manhattan. The Port Department operates containerport facilities at Port Newark, Elizabeth, Howland Hook, and Red Hook, as well as the Columbia Street Terminal and Erie Basin Terminal (site of the new Fishport) in Brooklyn, and the New York City Passenger Ship Terminal. The department also is supporting rail freight system improvements in partnership with other public agencies.

The World Trade Department operates the World Trade Center, and is constructing the Teleport complex on Staten Island and the Newark Legal and Communications Center. The department also works here and abroad to stimulate international trade, a mainstay of regional economy.

The newest Port Authority operating unit is the Economic Development Department whose project responsibilities include the Bathgate and Yonkers Industrial Parks already in operation, and subsequent industrial development projects planned or under development including the Port Authority Industrial Park at Elizabeth, an industrial part in Newark's South Ward, waterfront development projects in Queens and Hoboken, and a planned resource recovery facility in Essex County.

The Port Authority owns many of its facility sites, but operates the three major airports and some other facilities under lease agreements with host municipalities which provide for revenue sharing or in lieu of tax payments to local governments.

Facility Map



III. CAPITAL PROGRAM BY BUSINESS AREA

The proposed capital program concentrates the Port Authority's self-financing capabilities and public works construction skills on a comprehensive project agenda that addresses regional needs for each basic transportation mission assigned to the agency by New York and New Jersey, and fulfillment of funding commitments to other transportation and development investments targeted by the states.

Subject to agreement with the states on a financing plan incorporating additional revenue sources from the agency's own operations, the Port Authority plans to undertake capital project commitments totalling approximately $5.8 billion over the next five years, during which actual expenditures of nearly $4 billion are projected. These commitments include initial costs for major projects that will require additional spending for completion in the next decade.

Some of these projects require additional analysis and development; many require further review by other local, state, and federal agencies. Work at existing facilities generally must be programmed around their continuing operation through the construction period. Arrangements with commercial tenants or private investment partners must be concluded in some cases. The overall financing and construction schedule takes these factors into account.

Here is a review of the program by business area, including project investments by facility, their relationship to regional transportation and development needs,

and present cost estimates consistent with the status of each referenced project.

A. INTERSTATE TRANSPORTATION NETWORK

New Yorkers and New Jerseyans share a vital stake in the maintenance of an efficient Trans-Hudson transportation system adequate to the region's growing need for moving goods and people within the metropolitan area.

The agency's Rail Transportation Department operates the PATH system, and its Tunnels, Bridges & Terminals Department operates the vehicular crossings and related facilities. In recent years, the agency completed an expansion of the Port Authority Bus Terminal, began a major rehabilitation of the PATH system, and undertook many other facility and operational renovations to sustain vehicular and transit operations on these essential interstate links.

Despite these measures, brisk economic expansion on both sides of the Hudson is threatening to overwhelm key elements of the region's roadway and transit network, and overcoming this danger has been a central focus of the Port Authority's transportation planning and interagency relations in recent years.

Trans-Hudson weekday morning eastbound commutation has been growing at the approximately 3 percent annual rate overall predicted by the Port Authority, and the agency anticipates that more than 40,000 additional commuters from New Jersey and New York's west-of-Hudson metropolitan-area counties may be using the network by 1990. Reverse commuting by New Yorkers is

expected to grow as well, and interstate delivery of goods and services by truck is an increasing factor in the regional roadway picture.

Like other public agencies, the Port Authority is reconstructing older transit and roadway facilities and searching for affordable, attractive, and environmentally acceptable means of expanding capacity to meet demand. The agency has recommended a cooperative bi-state effort to expand transit services as the only practical approach to meeting Trans-Hudson peak-period demand over the next decade. Manhattan streets, the Port Authority tunnels, and some key New Jersey feeder roadways already are extremely congested during peak commuting hours. Chronic traffic delays, contrasted with steady improvement of some transit alternatives, have resulted in transit's absorption of virtually all the growth in Trans-Hudson commutation over the past year. Existing transit systems to and across the Hudson have significant potential for expansion of passenger-handling capacity. Port Authority capital plans therefore focus on creating expanded and more flexible transit services as the best means of serving the entire Trans-Hudson market.

New Initiatives: Trans-Hudson Capacity Expansion

Though most Trans-Hudson system facilities and services are straining with growing demand during commuter hours, the Lower Manhattan market poses special problems because of its heavy dependence on a single system – PATH and the connecting NJ Transit commuter-rail lines at Newark and Hoboken – and uncertainties about distribution of forecast demand growth across this fixed-

rail system. The Port Authority program provides for investments that will create substantial and flexible new capacity sufficient to handle expected demand into the early years of the next century.

The PATH system from Newark and Hoboken to the World Trade Center carries 47,000 people during the peak period; some 44,000 remain in the downtown area and account for 94 percent of all Trans-Hudson commuters bound for Lower Manhattan. PATH has experienced dramatic increases in ridership since 1980, creating crowded conditions, particularly on the Newark service. Additional PATH cars already on order will be arriving over the next two years to provide an increase from 7 to 8 car trains from Newark. These are part of the major PATH improvement program already underway (see below).

Nevertheless, projected demand is expected to exceed even this added capacity on the Newark service and existing Hoboken PATH capacity by 1990. Anticipated Hudson County waterfront development will add another layer of demand to these services which is difficult to forecast confidently at this time. To meet future peak-period demand additional, flexible transit capacity is needed which is expandable through the Nineties and beyond if necessary. The Port Authority capital program addresses this need through a proposed Hoboken-to-Lower Manhattan passenger ferry service and further investment to expand capacity of the Newark-to-World Trade Center PATH line, coupled with a commitment by New Jersey Transit to add the capability of shifting some commuter rail service between its Hoboken and Newark terminals.

Hoboken/Battery Park City Ferry Service

Passenger-only commuter ferry service offers a real opportunity to add substantial and flexible new Trans-Hudson capacity for the Lower Manhattan market in time to meet expected growth in demand. After extensive analysis of potential routes and services, the Port Authority capital program provides more than $150 million in capital investment over the next five years to create a modern ferry service linking the commuter rail hub at Hoboken with Lower Manhattan at Battery Park City.

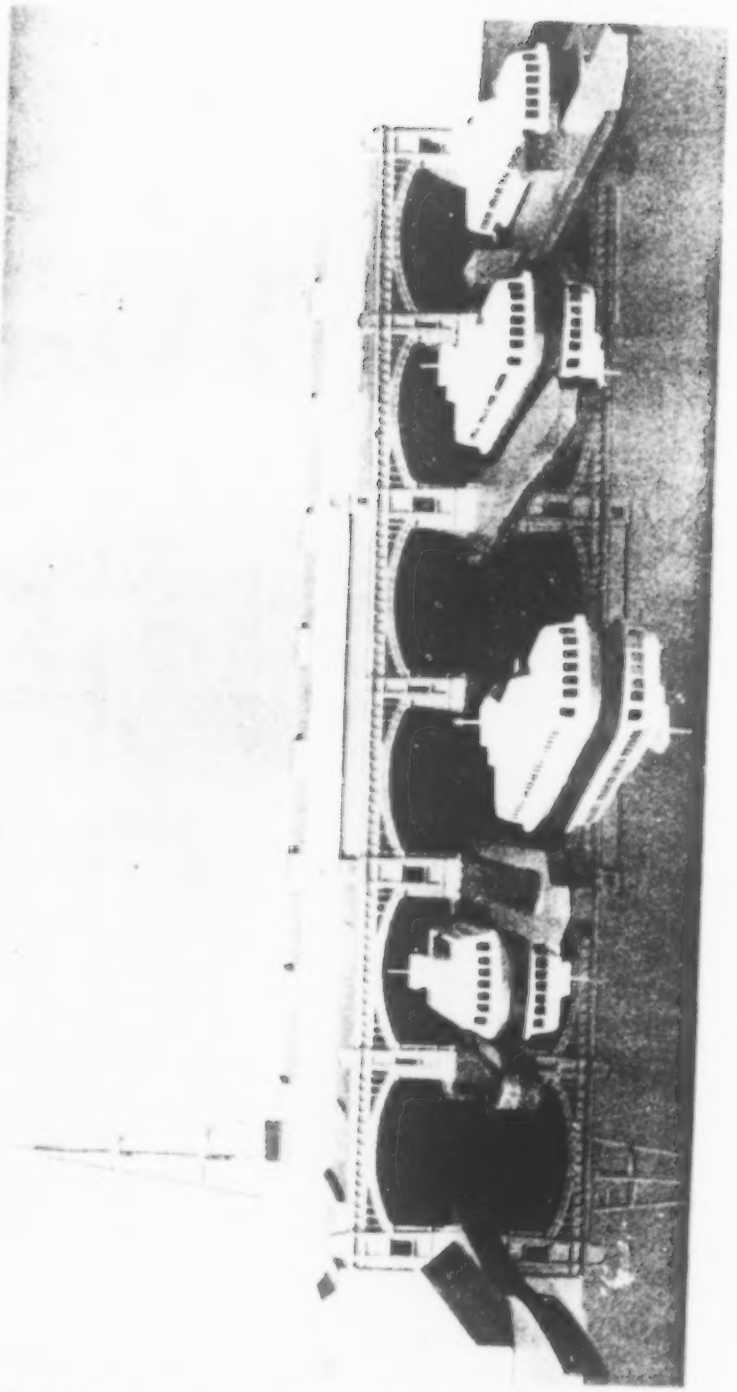
Though some operating issues remain to be resolved, current plans call for a four-vessel service with an initial peak-hour capacity of 4,500 passengers. Fare levels would reflect the ferries' role as an element of the mass transit system. Service would be provided only during morning and evening commuting hours, with vessels designed to facilitate off-peak chartering that could offset in part projected deficits of the ferry operation. Potential for private-sector involvement would be evaluated intensively as planning on the system proceeds.

Newark PATH Service Capacity Expansion

The capital program also provides for additional infrastructure investment in the PATH Newark-to-World Trade Center service to permit eventual use of trains up to ten cars in length, and additional PATH car purchases in the five-year program to run nine-car trains on this line. This is in addition to the scheduled expansion of Newark-WTC service from 7- to 8- car trains in 1988 under the PATH capital program already announced and also provided for in the five-year plan.

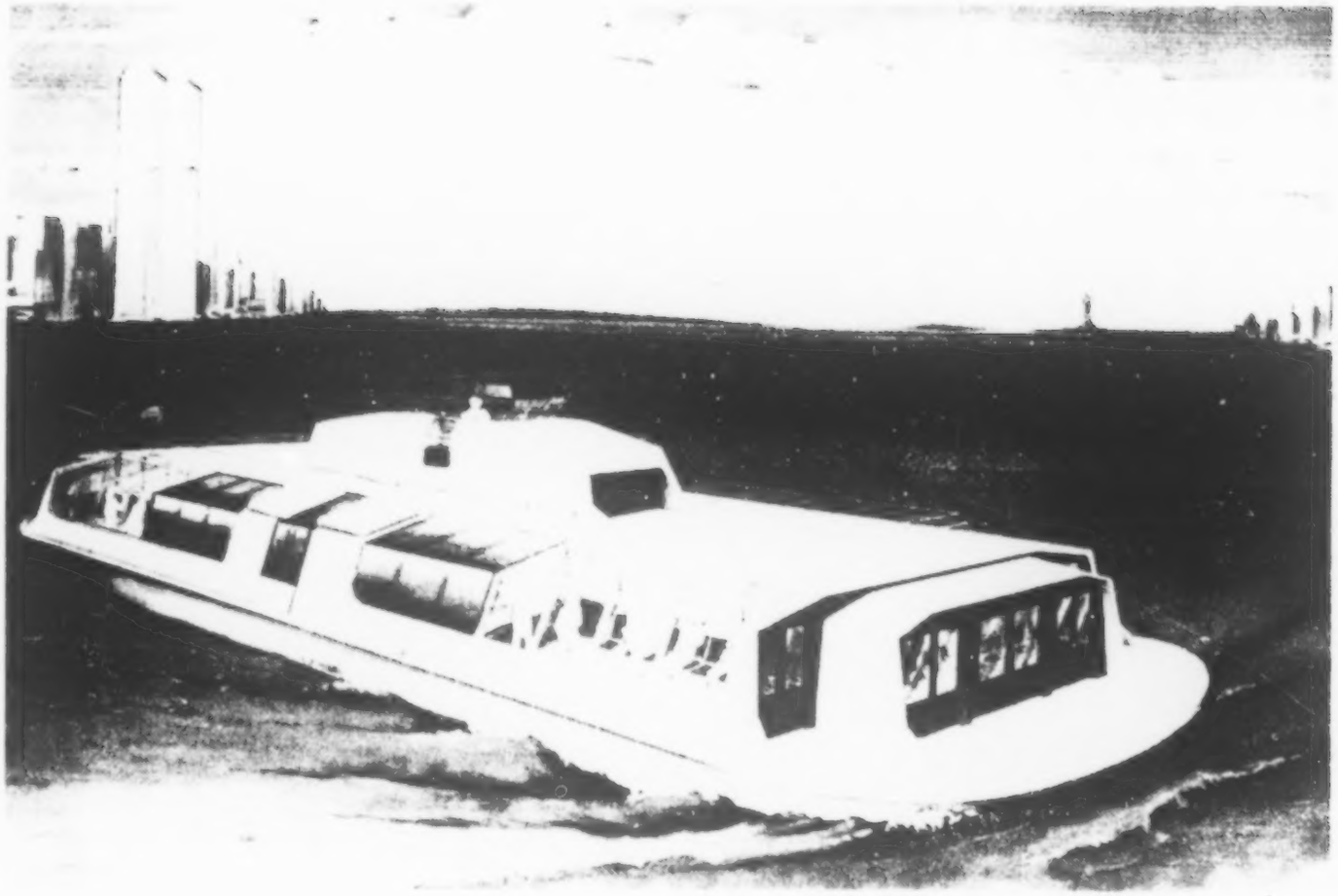
The additional proposed investment in the Newark-WTC PATH service can be accomplished at an estimated cost of about $70 million, including approximately $50 million in additional car purchases to allow the addition of the ninth car and at least $20 million in station reconstruction. Station platforms would be lengthened at the Harrison and Grove Street stations to accept 10-car trains. Ventilation, exit, and other modifications would be made at the Exchange Place Station. The 33rd Street station would be altered to accept 10-car trains during emergency diversions.

To complement the new Port Authority ferry and PATH Newark line investments, New Jersey Transit is to construct and operate a rail line – the proposed "Reverse Kearny connection" – which would permit some New Jersey Transit commuter trains now terminating at Newark to continue on to Hoboken where passengers would transfer either to PATH or the ferry service. In combination, the Port Authority and NJT projects create the capacity for staged expansion to meet projected demand levels through the Nineties beyond the year 2000.



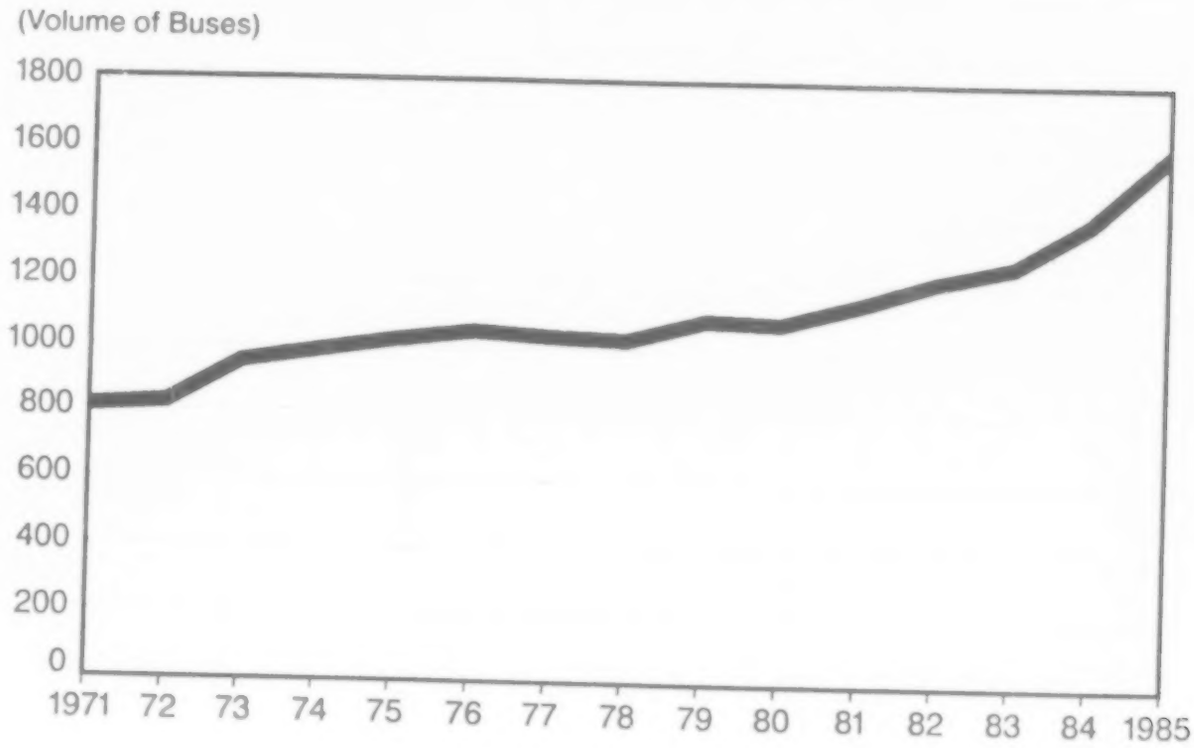
Model illustrates proposed ferry operation at existing Hoboken Terminal.

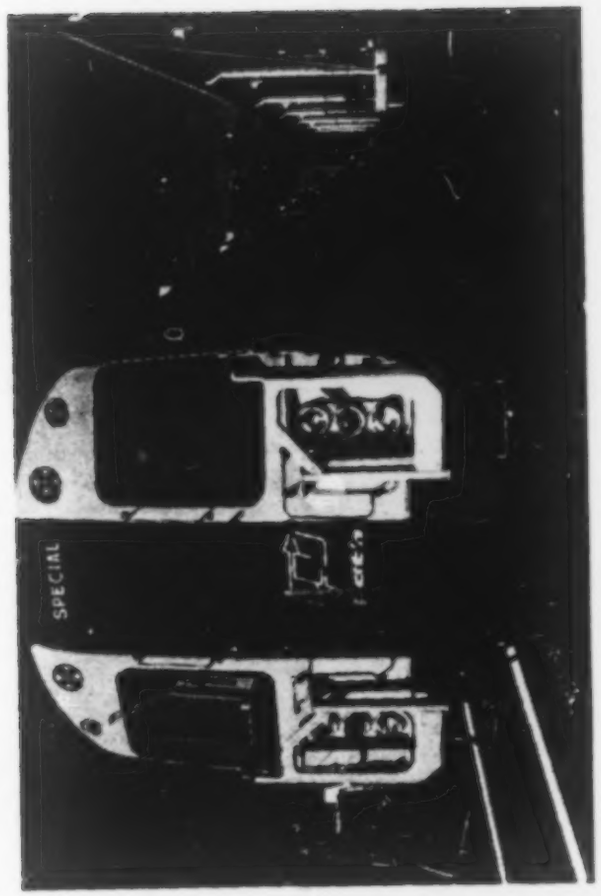
(preliminary rendering).



Current plans provide for a fleet of modern ferries specially designed for the Hudson River service. (preliminary rendering).

XBL Average A.M. Peak Daily Usage





PATH and the Exclusive Bus Lane System together carry half of Manhattan-bound commuters. Relief is needed on the congested XBL to cope with recent growth. PATH is replacing or renewing its entire fleet, with new cars already arriving.

Hudson Busway & Manhattan Improvements

The Exclusive Bus Lane (XBL) approach to the Lincoln Tunnel, a westbound lane reserved for eastbound buses in the morning peak period, is over capacity now, carrying more than 65,000 people in 1,700 buses daily, up from 1,200 buses in 1980. This unique bus feeder system, designed to give bus users a major travel time advantage over motorists, carries more people in the morning than any other single component of the Trans-Hudson system. The success of this 16-year-old transit operation, the need to relieve the current peak-hour (7:45 - 8:45am) capacity problem, and to provide for a substantial projected increase in bus demand to Midtown, has prompted intensive efforts by NJ Transit, NJDOT and the Port Authority to find another long-term exclusive bus access route to the tunnel. Most of these buses are destined to the Port Authority Bus Terminal in Midtown.

One promising option now under study is a 2.2 mile Hudson busway on available railroad right-of-way in Hudson County, connected to the Hudson County extension of the NJ Turnpike at its southern end and an approach to the Lincoln Tunnel at the northern end. This connection is feasible and could be constructed and in interim operation within four years, assuming full cooperation of all parties and an expedited project schedule. Further consultation with municipalities on the route is also planned.

This new bus feeder system could efficiently handle the buses bound for the Lincoln Tunnel during the peak hour from central and shore counties in New Jersey. This project would relieve the XBL operation which would

then be able to handle more efficiently buses from northern and western counties and provide for additional bus capacity. Estimated cost of construction of the Busway is $75-100 million, proposed to be shared by the Port Authority, State of New Jersey and the NJ Turnpike Authority. The five-year capital program provides approximately $25 million as the Port Authority share of the project cost.

The Hudson busway would preserve a substantial travel-time advantage for Midtown-bound bus commuters over motorists, and would maintain the bus option as an attractive means of serving anticipated growth in Trans-Hudson Midtown demand.

Focusing on Manhattan itself, the Port Authority is working with New York City and State transportation agencies, the Metropolitan Transportation Authority, and others to assess opportunities for improving the distribution of people and vehicles, especially from Trans-Hudson facilities. The five-year capital program allocates approximately $25 million in Port Authority support for this effort, with the specific application of these funds to be determined as interagency planning on transit and traffic issues proceeds.

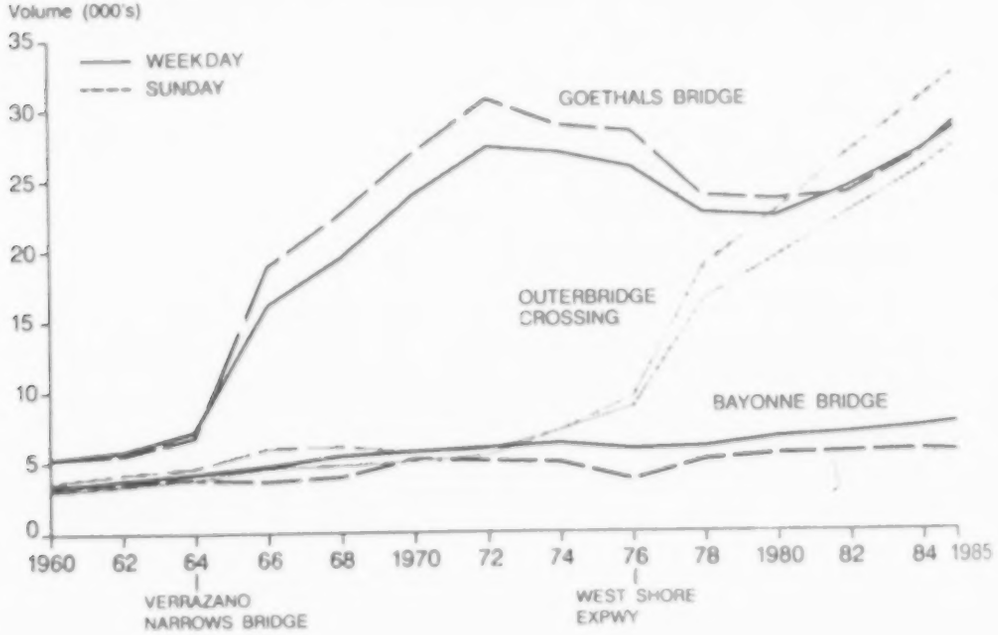
Other analyses underway by the Port Authority and public agencies in both states are expected to identify further incremental improvements in service and capacity on the Trans-Hudson network, especially for the Midtown market. The capital program's allowance for projects in study and development includes additional capital to help implement other Trans-Hudson congestion

relief and capacity improvements as viable projects emerge from the studies now in progress.

Planning for Expanded Capacity on the Staten Island Bridges System

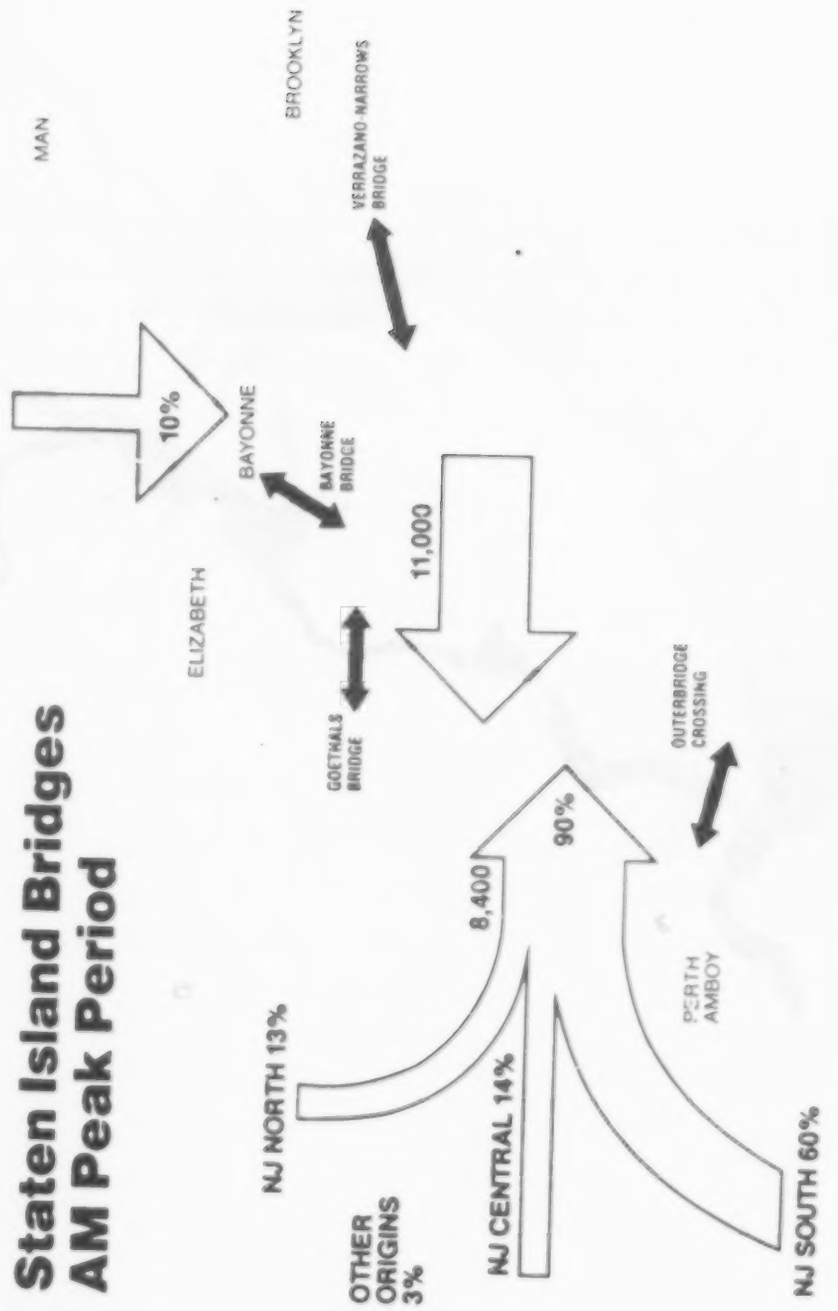
The three bridges connecting Staten Island with Union, Middlesex, and Hudson counties are the oldest facilities constructed by Port Authority. They now consistently are outpacing the Trans-Hudson vehicular crossings in annual traffic growth (5.8% v. 4.4% in 1985), with most of the increase concentrated at the Goethals Bridge and Outerbridge Crossing. Use of the Staten Island bridges grew 56% between 1978 and 1984, and the SIB crossings together now carry more vehicles than either the Lincoln or Holland Tunnels.

STATEN ISLAND BRIDGES
Average Daily Traffic – Eastbound (1960 – 1985)



SIB System: Aging Facilities Serve Growing Market

Traffic volumes have grown rapidly on the Outerbridge and Goethals, reflecting brisk local economic expansion.



SIB System: Aging Facilities Serve Growing Market

Port Authority motorist surveys reveal that most SIB commuters are traveling to jobs on S.I. or nearby N.J. counties.

This striking growth is closely tied to population and job gains on Staten Island itself and in the surrounding areas of New Jersey. Port Authority origin and destination surveys show that fully half of the trips taken across these crossings begin or end on Staten Island. The strongest weekday flow is from Staten Island to various New Jersey points within easy highway reach of the Staten Island bridges. This flow is projected to grow as Staten Island's labor force growth is expected to outpace job increases in the borough and residents increasingly take advantage of employment opportunities in New Jersey. A major component of the bridges' truck activity is destined for northwest Staten Island.

The growing local and regional importance of this system underscores the functional problems of these old facilities. The central steel spans of the Goethals and Outerbridge permit only 10-foot land widths, fully two feet below current Federal design standards. Higher traffic volumes and increasing use of wider trucks foreshadow increasing traffic pressure at these facilities.

Last year, the Port Authority spotlighted these problems in announcing a comprehensive study of the Staten Island Bridges system. That assessment, now nearing completion, will review short-range options for improving the level of service at these facilities – including bus service promotion if market potential exists – and will evaluate the costs and benefits of options for expanding the system to meet the needs of the communities serviced by these facilities. Erection of a twin structure paralleling the Goethals or the Outerbridge is the most readily apparent option, although the selection of the preferred site and the time frame in which expansion would be

needed await completion of the current study and evaluation by the Port Authority, transportation agencies and public officials in both states.

Though the five-year capital program does not provide funds for actual construction of an expanded facility, the agency recognized the need to begin allocating capital in preparation for a major investment of some kind in this vital system. The capital program allocates $20 million for start-up costs associated with this project over the next five years, in addition to rehabilitation expenditures provided for the existing facilities.

Completing the PATH Rehabilitation Program

The newly proposed expansion investment for the Newark service is an addition to PATH's extensive capital program, now well underway, which provides for replacement or rehabilitation of the entire car fleet, improved rider comfort and safety and refurbishing of shops, yards and electrical systems. These improvements will assure the PATH riders a comfortable, safe and smooth ride. The estimated 1987-1991 cost of the previously announced PATH improvement program is $760 million, some of which already has been committed.

Exclusive of the new Newark service proposed expansion, PATH is purchasing 95 new cars to modernize and expand its fleet and is rehabilitating 248 cars that date from the 1960s. These new-car purchases will make possible the expansion of the Newark-to-World Trade Center service from 7 to 8 cars and the Journal Square-to-33rd St. service from 5 to 7 cars. Components will be replaced on the older cars to insure safe and reliable

operation until new or rehabilitated cars arrive. PATH has committed $180 million to this car program.

Planning is underway for a new PATH car maintenance facility in Harrison. The new shop and yard will replace one that opened in 1910. It is operating beyond its capacity, has outmoded shop facilities, constrained rail access and inadequate storage space. The new shop will be equipped with modern equipment, and the yard will contain more car storage area and be more accessible. The estimated cost of the facility is approximately $200 million.

Safety-related projects include the installation of tunnel emergency ventilation structures and standpipe systems that will enhance safety response and fire protection. New and/or relocated switching and power stations and upgraded electrical distribution and power systems are planned to refurbish or replace aging electrical systems, making PATH more reliable and efficient. Improvements to the signal system, now in its eight decade, will enhance PATH's safety and efficiency. Track replacement is also slated along the right-of-way. In addition, the lift bridge over the Hackensack River, a chronic source of service delays, is being rehabilitated. The estimated cost of all these improvements is $290 million.

A PATH Station Improvement Program will alleviate congestion at some existing stations and include the renovation of cramped and outmoded facilities. The Exchange Place Station is to be rebuilt. New platforms, signs, lighting and wall surfaces will be installed at other stations along the PATH system. Added stairs and escalators are planned for the World Trade Center terminal. An

improved fare collection system is planned. The estimated cost of the station work is $90 million.

Tunnels, Bridges and Terminals:
Maintaining Safe and Efficient Operations

For the agency's Tunnels, Bridges and Terminals Department, the primary capital program objective is to maintain and enhance the structural integrity of its aging facilities and maintain standards of safety and comfort for their patrons. Since the vehicular crossings and terminals are vital to the everyday movement of people and goods, these projects generally must be accomplished without taking the facilities out of operation for extended periods. The program includes some work at virtually every facility operated by the department.

At the **Lincoln Tunnel**, the Port Authority plans to rehabilitate bridges over the tunnel's New York approaches, replace concrete roadway slabs on ramps used by buses and replace or patch ceiling tiles inside the tunnel, all of which will improve the facility's structural integrity and increase patron safety. The agency is also planning the replacement of toll booths, rehabilitation of the toll plaza and the expansion of the tunnel administration building. A supervisory control system and a computer system that can monitor tunnel fans, pumps, valves and other operating instruments is also planned. Such a system improves emergency response capability and allows quick adjustment to cope with changes in the tunnel environment, benefiting driver comfort. The estimated cost of these and other proposed improvements at the Lincoln Tunnel is approximately $140 million.

Ceilings, lighting systems, curbs, drains and traffic signals in both tubes of the **Holland Tunnel** are being replaced. The agency plans to redevelop the Holland Tunnel toll plaza and adjacent property to permit smoother traffic flow in light of ongoing development in the area. Curbs and drains inside the tunnel will be removed and replaced as well. The estimated cost is $115 million.

At the **George Washington Bridge,** ceilings above the Trans-Manhattan Expressway are being inspected and replaced where necessary and granite fascia panels at the anchorage of the main support cable are being replaced. Planned projects include the replacement of inspection and maintenance platforms on the underside of the bridge and the rehabilitation of concrete roadways and associated steel bearings at various spots on the bridge. Approximately $55 million is to be allocated to these projects.

Trans—Hudson Network
Capital Requirements – Maintenance of Present System
1987-1991

PATH		
Cars	$180 million	
Shops & Yards	200 million	
Safety Program	120 million	
Electrical Program	95 million	
Station Program	90 million	
Miscellaneous	75 million	
Total		$760 million
TB&T		
Holland Tunnel	$115 million	
Lincoln Tunnel	140 million	
Staten Island Bridges	65 million	
George Washington Bridge	55 million	
Port Authority Bus Terminal	55 million	
Multi-facility Projects	15 million	
Total	445 million	
TOTAL		$1,205 million

The **Staten Island Bridges** have a number of rehabilitation projects underway or planned. The Port Authority is rehabilitating the concrete deck of the Outerbridge Crossing and replacing the pavement. In addition, the agency plans to use funds made available by the 1984 toll increases to supplement work done by the State of New Jersey on the Route 169 project. Direct connections will be constructed to the Bayonne Bridge from New Jersey Route 169 and the bridge's viaduct will be

widened. Toll booths serving the Goethals Bridge will also be replaced. The total estimated cost of these projects is $65 million, including an allocation of up to $20 million for initial costs associated with preparations for expansion of the SIB system beyond the forecast period ending in 1991.

The exterior of the **Port Authority Bus Terminal** along 40th and 41st Streets and Ninth Avenue will be repaired and refurbished, the passenger unloading platforms will be modernized, additional tenant areas will be developed and building systems will be renovated. The Port Authority plans to restore exterior walls, rehabilitate parking level floor decks and participate in the construction of a pedestrian bridge to the east side of Eighth Avenue as part of the 42nd St. redevelopment project. Estimated cost: $55 million.

The Port Authority will install a traffic diversion sign system at bridge and tunnel crossings to alert motorists of construction or emergency delays and will improve revenue collection equipment. The estimated cost of these projects is $15 million.

B. AVIATION

The region's system of three major airports is the world's busiest metropolitan aviation complex. John F. Kennedy International Airport handled 29 million passengers in 1985 while more than 20 million people passed through LaGuardia. Newark International, the fastest growing airport in the United States, handled 29 million passengers in 1985. Passenger volumes are expected to rise even

further by 1990, with Kennedy handling 35 million people, LaGuardia 25 million and Newark 40 million. This regional aviation complex also is the nation's air cargo capital, and substantial tonnage increases are projected as well during this period.

As part of an ongoing effort to keep pace with rapid changes in the airline industry, the Port Authority has steadily improved its airport facilities. An extensive construction and rehabilitation program at Newark International Airport, lasting through the 1970s and into this decade, created new terminal and access facilities that positioned the region to take advantage of the emergence of new discount air service "hubs" that followed industry deregulation. Development of an on-airport hotel increased Newark's attractiveness to business travelers. The construction of two new terminals at LaGuardia Airport increased its efficiency and expanded terminal capacity.

The aviation industry supported by these three airports is among this region's most potent economic assets. The industry directly and indirectly employs nearly 300,000 people, generates nearly $19 billion in economic activity, $6.2 billion in wages and salaries, $3 billion in business income and $600 million in regional taxes. The industry, which includes a wide range of activities throughout the metropolitan area, accounts for 3.5 percent of the gross regional product.

This region's primacy as the nation's predominant aviation "gateway," or international air service hub, provides an important competitive advantage over many

other metropolitan areas, some of which are making billion-dollar-plus investments in new or expanded regional airports which could become competitors with the New York-New Jersey metropolitan area, especially in an era of volatile changes in domestic and international aviation and introduction of new longer-range commercial aircraft. Boston, Chicago, and Denver have airport and airport-access work getting underway to enhance their gateway status. Los Angeles and Dallas-Fort Worth have emerged as attractive gateways with recently completed airport redevelopment projects.

The agency must respond to rapidly increasing passenger demand and these new competitive challenges by expanding the physical capacity of each airport and by increasing its operating efficiency. Ground access approaches and on-airport circulation must be improved and passenger and cargo terminals enlarged, expanded and modernized. The quality of service to patrons must also be enhanced through improved passenger assistance, added terminal and cargo area security, more efficient cargo processing and smoother check-in procedures. These improvements will strengthen the region's position as a leading international gateway and make it a more attractive place to visit or conduct business.

The Port Authority plans to spend $2.4 billion for already authorized or planned projects at its airports between now and 1991, the largest element of the total five-year capital program.

New Initiatives: JFK 2000, NIA 2000, LaGuardia Terminal

The Aviation Department's capital program recognizes that major investments in the bi-state airport complex have become essential to maintain the region's gateway position. John F. Kennedy International Airport serves as the primary international gateway facility; the JFK 2000 project will expand its passenger-handling capacity to accommodate projected demand to the end of the century and to enhance the airport's efficiency and passenger services.

Newark International Airport's expanding passenger demand now requires the improved on-airport circulation provided in the NIA 2000 project, as well as enhanced ground connections to its diversified regional passenger market. LaGuardia Airport, where expansion capacity is most constrained, requires modernization to maintain its vital role as a facility providing efficient and comprehensive domestic connections for the region's residents and visiting businesspeople from across the nation.

As annual passenger demand has burgeoned in recent years, the Port Authority and its airport tenants have made incremental facility improvements and have introduced new ground-access services. More extensive investments are required to support projected growth.

Intensive assessment of JFK's requirements and redevelopment options now is complete after in-depth analysis, and the capital program for the next five years includes commencement of major construction there, ultimately totaling an estimated $2.7 billion over the next eight years.

The proposed JFK 2000 project focuses on an extensive reconfiguration of the Central Terminal Area of the airport, where congestion hinders efficient movement of passengers "interlining" between connecting flights, in baggage handling, and in pick-up and drop-off of passengers to airline terminals. As other "gateway" airports have been developed or modernized in the United States and Europe, JFK's initially superior level of service has deteriorated measurably by comparison under the burden of passenger volumes twice the original design capacity.

The objective of JFK 2000 is to provide an effective solution to the circulation and service problem evident already and to sustain efficient and comfortable passenger services at the airport as demand grows from the present 30 million passengers per year to a projected level of 45 million by the end of the century. JFK 2000 is an integrated project that includes expansion of the International Arrivals Building and Federal Inspection (Customs) Hall, an automated baggage-handling system, a people-mover system linking the terminals to a central transportation center, a reconfigured roadway network and a new Federal Aviation Administration (FAA) control tower with improved sight lines to aircraft operations areas.

Plans call for construction to begin in 1987 and to continue into the Nineties. Interim circulation and baggage system improvements already are underway. The capital program calls for commitment by 1991 of $900 million of the estimated total project cost.

NIA 2000 expands upon the ongoing modernization already underway at Newark International Airport. Beyond the parking expansion and other improvements already authorized for NIA, Port Authority planners and professional consultants are completing assessments of design options for necessary circulation and landside access improvements at NIA. Annual passenger demand at the airport, now 29 million, is expected to increase to the same order of magnitude as forecast at JFK.

Necessary improvements will include new roadways, structural parking, and an on-airport "people mover" system. Improving off-airport connections for NIA's widely dispersed market requires a combination of strategies, most notably development of satellite terminals where suburban New Jersey users could park private cars and use scheduled vans or buses for the trip to or from the airport, upgrading of service from Newark Penn Station to the airport. The plan also includes funds to construct a direct link between the on-airport "people-mover" and the proposed transit line between downtown Newark and Elizabeth, now being studied by state and local officials and private interests. The capital program anticipates commitment of $650 million for these projects during the 1987-1991 forecast period, of a total estimated Newark 2000 cost of $1.35 billion.

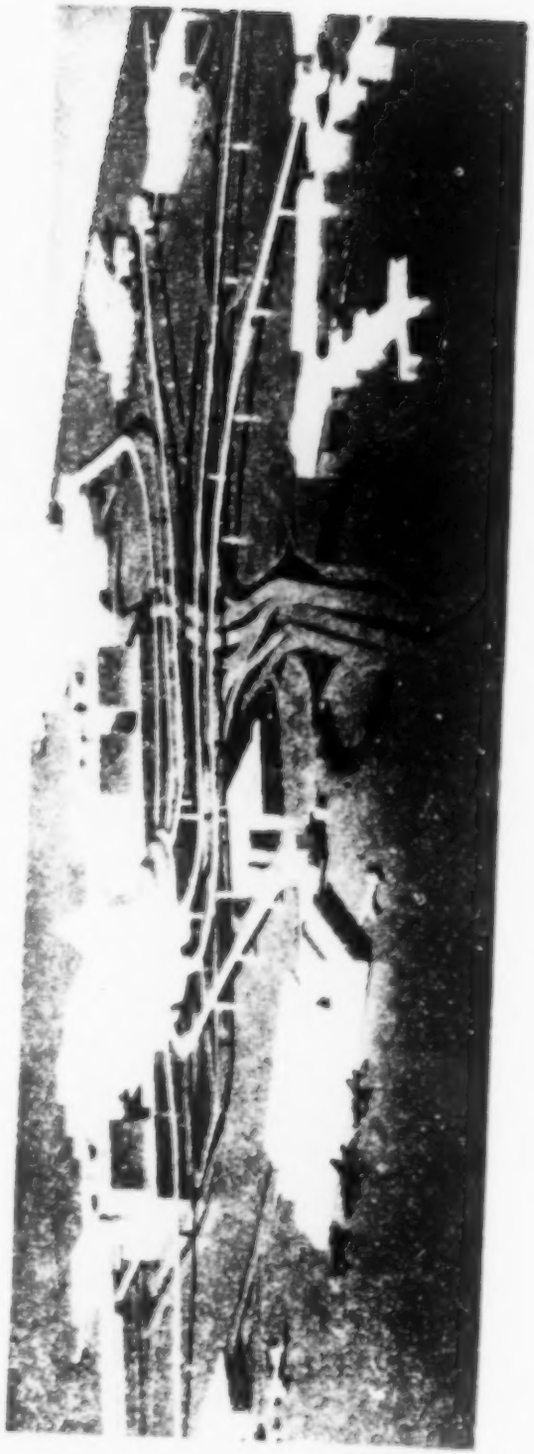
Projects at LaGuardia Airport will stretch passenger-handling capacity. The Port Authority plans to construct a new terminal and make airport highway access improvements at the east end of the airport. These planned projects will create two separate terminal areas, one at the existing Central Terminal complex and a second at the east end terminals. Each will be capable of handling 15

million passengers annually. The highway access project consist of a new overpass spanning the Grand Central Parkway that will permit entrance to the airport and lessen traffic congestion on the parkway. East-end improvements to LaGuardia Airport carry estimated project costs of $200 million: $170 million for the terminal and $30 million for highway improvements.

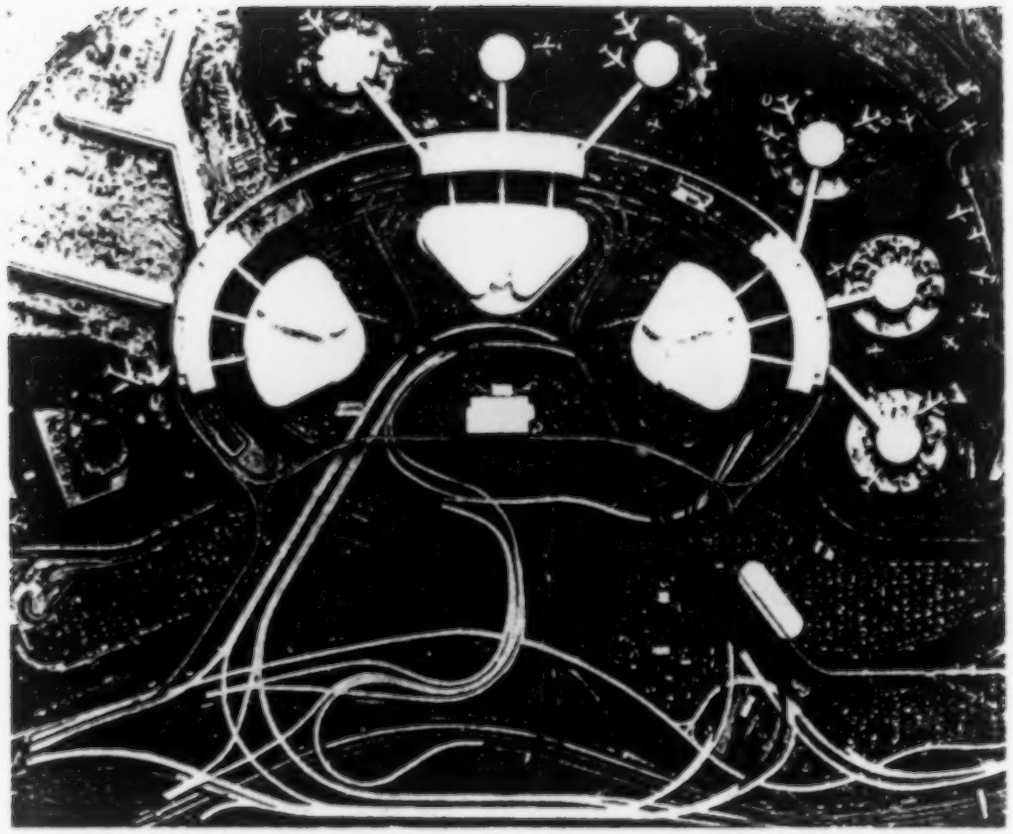
Passenger facilities in LaGuardia's Central Terminal area will be modernized as well, with added space provided for auto rental and baggage claim services. A direct entrance from the Grand Central Parkway to the parking garage will be built and the departure level roadway will be widened. Aircraft services will be improved through added aircraft parking areas, an additional overrun area at the end of runway 13-31 and a new localizer. Estimated costs for these projects are about $120 million.

Additional Airport Projects Slated

In addition to the proposed JFK 2000 program, NIA 2000 and new LaGuardia Terminal, the Aviation Department is undertaking a number of other projects at all three major airports and in the region's heliport system, an important commercial service to the region's businesses. These projects, some already authorized and others planned during the coming five years, are summarized below by facility.



Conceptual model of JFK 2000 shows "people mover" links connecting airline terminals with transportation center.



NIA on- and off-airport access improvements must reflect widely dispersed market served by this busy facility.

Improvements at **John F. Kennedy International Airport** are aimed at easing congestion on roadway approaches to the airport and at enhancing on-airport cargo facilities. The Port Authority is sharing in the costs of New York State's project to provide exclusive airport connections on the Nassau Expressway in the area of the 150th Street entrance to the airport. That entrance roadway is being redesigned to improve traffic flow in both directions between the Central Terminal Area and the Nassau Expressway/Southern State Parkway.

The agency is advancing some of the costs of converting airplane hangars to cargo facilities by airport tenants. It is also providing funds for the construction of a cargo building in the north cargo area and building a new taxiway in that area as well. A multi-tenant air cargo service, which will offer additional space for customs brokers and freight forwarders at the airport, is being established.

In addition, the Port Authority will take steps to improve terminal, runway and building conditions. Modifications will be made to the International Arrivals Building and passenger loading devices at IAB aircraft gates will be replaced. Restoration of runways is planned to maintain them at Federal Aviation Administration standards. Aircraft taxiways will be built, restored and extended to improve aircraft access to gates and runways. A computer center will be built to improve customs clearance and air cargo shipment procedures as part of the Air Cargo Fast Flow Program. The airport's central heating and refrigeration plant will be expanded and more efficient equipment installed. The Port Authority Police Emergency Garage will be expanded to handle more officers and equipment. Utility systems and other underground infrastructure will be replaced as needed. Projects

other than JFK 2000 already authorized or planned at this airport total approximately $330 million through 1991.

At **Newark International Airport,** in addition to the newly proposed landside circulation and access project, Terminal C will be completed by extending and upgrading aircraft fuel distribution systems, completing taxiways and building a courtyard area to accommodate ground transportation services. Also planned are an additional reduced rate auto parking lot and added exit lanes at existing lots. The agency will build two new facilities for maintenance equipment as well. NIA projects already authorized or planned equal approximately $210 million through 1991, exclusive of the newly proposed circulation and access improvements.

The agency will rehabilitate and reconstruct the **Downtown Manhattan Heliport,** north of the Staten Island Ferry Terminal, adding a new terminal building. Several projects will improve conditions in and around all three airports. The Port Authority, with support from the FAA's Noise Abatement Program, makes payments to school boards in communities adjacent to the airports for soundproofing selected schools in close proximity to them. Work has been authorized at 13 schools. Obsolete parking lot equipment will be replaced to improve revenue collection and a subsurface oil project will remove accumulated oil, eliminate fuel odors from certain parts of the airports and prevent underground migration of oil from storage areas.

C. PORT COMMERCE: THE COMPETITIVE CHALLENGE

The interregional competitive challenge that characterizes the aviation industry is already a reality facing the

region's still-vital maritime sector. Ocean cargo shipping and landside distribution are undergoing a technical, corporate, and regulatory revolution that puts an unprecedented premium on maintaining modern, flexible port terminal facilities and efficient landside truck and rail connections. The bi-state port's historic primacy as the nation's ocean gateway is under direct assault from Baltimore, Norfolk and other Atlantic coast ports to the south and as far north as Halifax, Canada, as public agencies in these regions make new investments in terminals and deepened channels with the aim of siphoning cargo that now is shipped through this port.

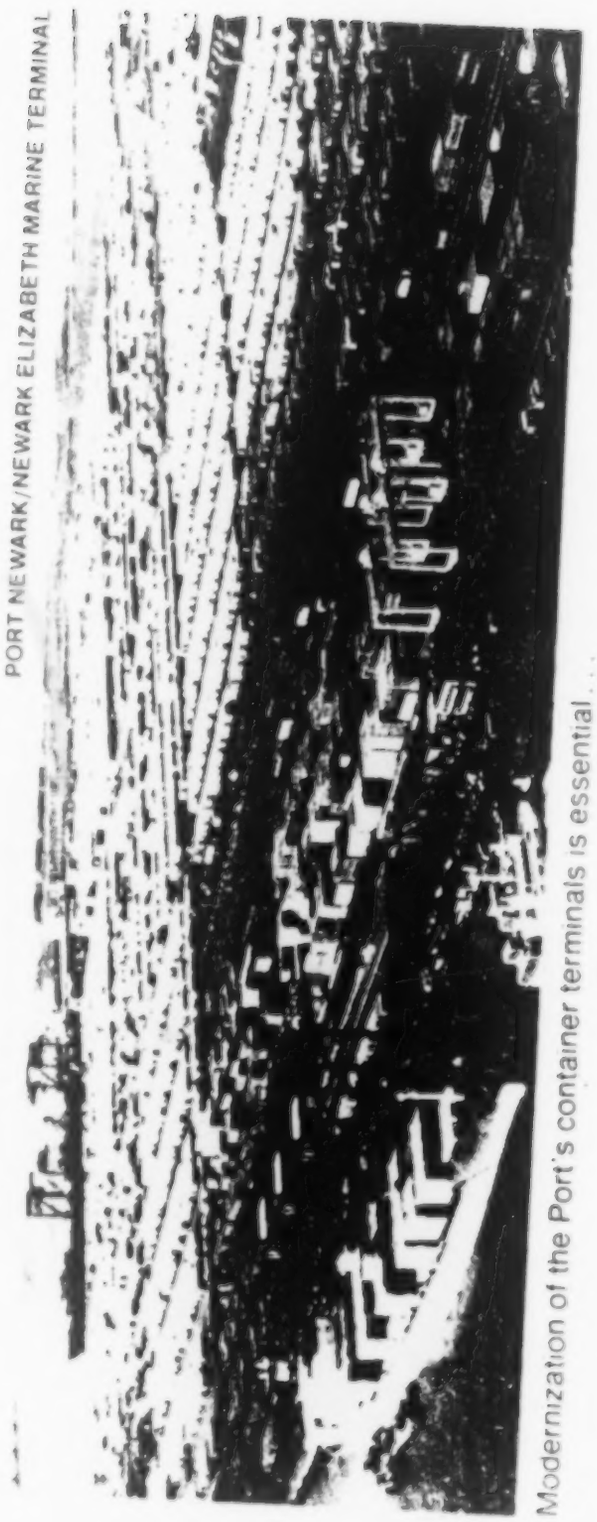
The cost, quality and accessibility of intermodal services within the Port District directly affect this port's share of North Atlantic trade. The Port Authority's primary mission in port commerce is to maintain and strengthen the position of the Port of New York and New Jersey as the leading "load center" in the North Atlantic region. Shipping lines increasingly are concentrating their operations by choosing a single harbor to serve continental markets where they traditionally have had multiple ports of call. The region must modernize its terminals, channels and intermodal facilities to accommodate a new generation of larger container ships. It must improve traffic (freight shipping) services and productivity to enhance its competitive position. It should also act to expand business and employment opportunities by developing innovative new projects that will provide jobs in port and port-related activities.

The bi-state working port, together with the concentration of maritime trade services that support it, make a substantial contribution to the region's economy. The industry generates (in 1984 dollars): $14 billion in economic activity; nearly 200,000 jobs; $4.2 billion in wages

and salaries; $2.3 billion in business income; and $400 million in state and city income and sales taxes. This represents 3 percent of gross regional product and 3 percent of regional employment. This impact spans many sectors of the regional economy. Cargo handling, freight forwarding, inland/ocean transportation, export-import wholesaling and distribution account for 54 percent of the total number of jobs. The rest are in sectors that serve the port industry, such as ship maintenance and repair and in other services used by maritime employers and this workforce.

The Port Authority plans to spend an estimated $510 million between 1987 and 1991 on port commerce projects. This work will be done at the agency's two major cargo handling facilities, Port Newark and the Elizabeth Port Authority Marine Terminal, as well as at the Howland Hook Marine Terminal on Staten Island, at the Port Authority Fishport in Brooklyn and at other facilities involved in port commerce. The agency has also budgeted capital funds for channel dredging, responding to a critical need in the bi-state harbor.

Dredging: The new generation of jumbo containerships requires deeper channel drafts than currently exist in New York Harbor and other port waterways. Channel deepening is a high priority if the port is to maintain its competitive edge over other ports and emerge as the primary North Atlantic load center. The Port Authority is working closely with the region's governments, the U.S. Army Corps of Engineers and maritime labor and industry associations to ensure timely action here to take advantage of the recent enactment of Federal legislation authorizing the resumption of harbor channel dredging. In anticipation of its enactment, the agency entered into an agreement with the Corps to help provide dredging of

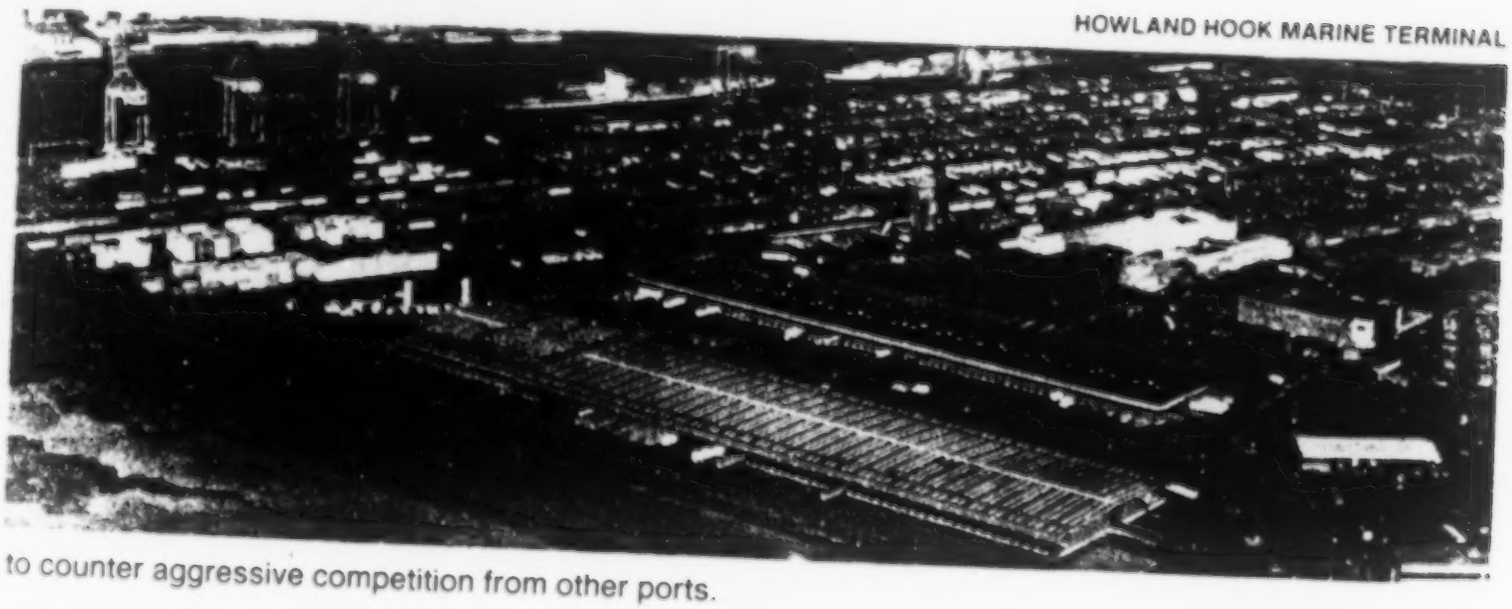


Modernization of the Port's container terminals is essential...

NORTH ATLANTIC OCEANBORNE GENERAL CARGO TRADE (EXPORTS & IMPORTS) 1985 vs 1984 (Long Tons)

CUSTOMS DISTRICT	1985	1984	% CHANGE	% N.A. 1985	% N.A. 1984
1. New York	13,747,989	13,085,333	+ 5.1	46.0	45.5
2. Baltimore	5,086,629	5,246,674	− 3.1	17.0	18.2
3. Philadelphia	4,866,271	4,745,269	+ 2.5	16.3	16.5
4. Norfolk	3,700,920	3,122,908	+18.5	12.4	10.9
5. Bridgeport	1,190,990	1,376,069	−13.4	4.0	4.8
6. Boston	769,519	679,042	+13.3	2.6	2.4
7. Providence	317,045	318,322	− 0.4	1.0	1.1
8. Portland	197,435	180,701	+ 9.3	0.7	0.6
Total N.A.	29,876,799	28,754,318	+ 3.9	100.0	100.0

HOWLAND HOOK MARINE TERMINAL



to counter aggressive competition from other ports.

channels the berths serving Port Newark/Elizabeth and Howland Hook from 35-foot to 40-foot depths. The Port Authority anticipates an initial $61 million outlay for the Newark Bay/Kill Van Kull and Arthur Kill dredging projects.

At **Port Newark,** two existing distribution buildings are being converted into a plant for processing gypsum from a bulk commodity into sheetrock. The Port Authority will provide for the purchase of a hopper and a conveyor and the construction of a storage building for this project. The agency has also provided for the construction and the purchase of equipment for a new juice facility, the second at Port Newark. These facilities import bulk concentrate and process it into orange juice.

Also at Port Newark, a new office building whose main tenant will be the U.S. Customs Service will be constructed and existing facilities will be rehabilitated as structural integrity requirements dictate. Authorized and planned spending at Port Newark totals $70 million through 1991.

To accommodate the added cargo the larger ships can carry, additional upland space is needed. The Port Authority is constructing two cargo distribution buildings at the **Elizabeth Marine Terminal** and installing supporting utilities and paved areas. The Port Authority is interested in acquiring two parcels adjacent to the Elizabeth terminal and is discussing this possible acquisition with the city. Authorized and planned work at Port Elizabeth totals about $180 million through 1991.

Last year, the agency undertook renovation of the **Howland Hook Marine Terminal** to accommodate the

new larger containerships and expanded loads they carry. About $20 million already has been expended on this work, of a total investment originally estimated at $110 million, which the agency will reevaluate with the City of New York, the terminal's owner, in light of the recent announced reorganization of operations by the terminal's sole tenant.

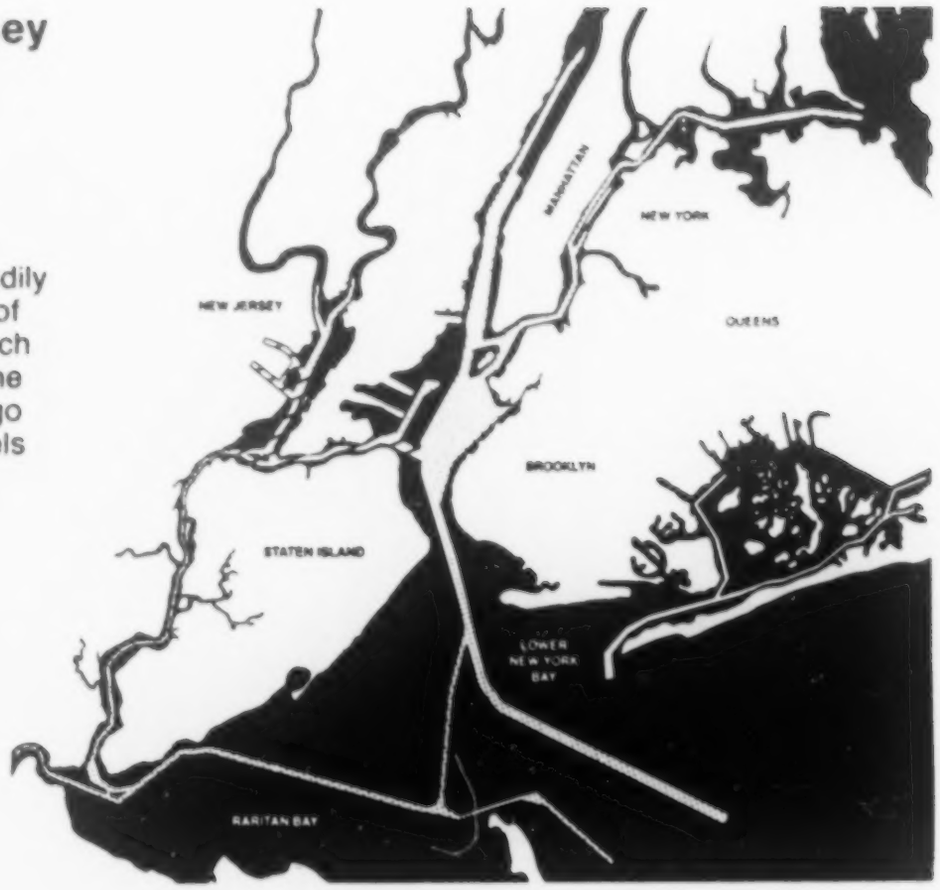
Fishport, the fish harvesting, processing and distribution center at Erie Basin in Brooklyn that will revitalize the Port District's fishing industry, already has five tenants with leases totaling nearly 180,000 square feet. Fishport is expected to generate regional sales of $130 million and annual payrolls of $23 million. It is expected to be in operation by early 1987. The agency is also engaged in waterfront cleanup in the Fishport area. The total cost of the Fishport project is about $30 million, including funds already spent. The Port Authority also has offered to support development of a fisheries, marine or port development project in New Jersey, as part of its Bistate Fisheries Development Program, subject to development of an economically viable project.

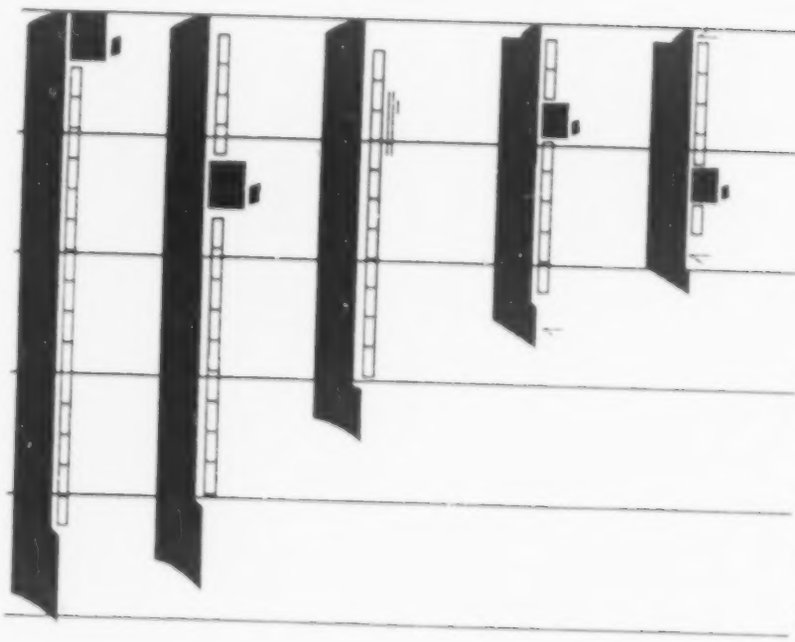
The construction of the **Oak Point Rail Link,** part of New York State's effort to improve rail freight service from Albany and the west to New York City, is being supported in part by a joint effort of the Port Authority and New York's Department of Transportation. The Port Authority is allocating $39 million towards this project.

The Port Authority has also committed funds in support of the Navy's planned establishment of a **Homeport** for a Surface Action Group at Stapleton on Staten Island. Navy homeporting is expected to bring additional ship

New York-New Jersey CHANNELS

Dredging to maintain and deepen harbor channels is needed to accomodate steadily increasing length and draft of modern containerships, which have doubled in size from the C-2 class of a generation ago to the Econship-class vessels already in use.





repair work to the port's remaining drydocks. The Port Authority's contribution is $15 million.

Importation of foreign automobiles to the U.S. currently is a growth area in the maritime trade. To maintain sufficient berthing and processing facilities for the thousands of imported cars entering through the Port, the agency will build a new discharge and processing facility on a 145-acre site at Port Jersey-Greenville Yards. Cost is an estimated $31 million.

The Port Authority has several additional port commerce project studies underway. The need for further improvements at the Red Hook Container Terminal is being evaluated. The agency is working with the New York State Department of Transportation on freight movement problems in Brooklyn, in the hope of improving truck access to and through the borough.

D. REGIONAL DEVELOPMENT

The fundamental goal of the Port Authority is sustaining and improving the region's economic performance through its system of transportation facilities and services. To help the region make the most of these transportation assets, the agency has focused increasingly on promoting international commerce and on strengthening the older communities in the region where most of the agency's facilities are located.

These concerns have grown into basic business areas for the agency in their own right. The World Trade Department not only operates the World Trade Center, a

regional focal point for international trade, but also provides other trade promotion and support services benefiting the bi-state business community. The Economic Development Department, supported by the Port Authority's overall resources, is pursing an innovative project agenda targeted to attracting new private investment and jobs to parts of the region that have not participated fully in the region's economic recovery.

The needs of commerce and the needs of the region's economically distressed communities come together in the extensive agenda of new development projects and other investments already authorized for both departments.

World Trade

In addition to operating the World Trade Center and providing trade support services, the World Trade Department is working to improve regional telecommunications capacity, which will enhance the metropolitan area's ability to compete with other international business centers. The agency will also use management expertise gained through its World Trade Center operations to support new business development in Newark.

The Port Authority's capital program for the years 1987-1991 includes more than $110 million for these "commercial infrastructure" projects. This work includes structural rehabilitation of parts of the World Trade Center complex; continued development of Teleport, a satellite communications center and office park on Staten

Island; and construction of the Newark Legal and Communications Center, and innovative condominium-style complex for Newark's legal community.

The first two buildings to be constructed at **Teleport** were completed in 1986. Antenna dishes which receive and send data transmitted via satellite are being installed in Teleport's enclosed earth station field. A fiber-optic cable network which connects Teleport with points in Manhattan, Brooklyn, Queens and New Jersey has been installed, and will be extended into additional areas during the next five years. The Telecenter Building has been leased and Teleport I is currently being marketed by Teleport Associates. Teleport marketing staff is actively pursuing other clients and negotiations with several are underway. Approximately $15 million in further capital investment is anticipated at Teleport through the five-year plan.

The Port Authority, with the city of Newark and the Newark Economic Development Corporation, has begun work on the **Newark Legal and Communications Center.** The facility had been designed especially for law firms, and will give them access to share computer data banks and other special legal services. The center will have a fiber-optic link to the Teleport. The first tenants are scheduled to occupy space in 1988. The estimated total project cost is approximately $50 million. The Port Authority will undertake rehabilitation projects in the **World Trade Center.** A fire safety project will include expansion of the center's alarm and communications systems, alterations in building core areas and further installation of sprinklers. The agency will also erect interior and exterior signs throughout the complex and build a

new entrance to the Cortlandt Street subway station. The agency is planning major rehabilitation of exterior walls of the World Trade Center and will be constructing new entrances and exits within the complex. Approximately $50 million is allocated for these projects in the next five years.

Economic Development: Expanding Opportunities for Growth

The Port Authority's Economic Development Department has the lead role for the agency in fostering new industrial and commercial development in some of the region's most distressed areas. Since 1978, the agency has worked with the governors and legislatures of both states to identify specific projects that harness the agency's capital capacity and business skills to bring new business and employment opportunities and commercial revitalization to the region.

The agency's capital program in Economic Development furthers these goals. It targets investments and the jobs they produce to areas in the region that have not participated fully in the region's overall economic recovery. The Port Authority operates three industrial parks, in The Bronx, Elizabeth and Yonkers, and recently authorized a fourth, in Newark. It is planning urban waterfront development in Hoboken, New Jersey and at Hunters Point in Queens. A proposed resource recovery plant for Essex County would be built in Newark under Port Authority auspices.

All of these projects are located within some of the region's chronically depressed communities. These areas

generally have lagged behind the region's impressive economic recovery and continued growth. They continued to lose residents and jobs long after the rest of the region began to recover, and began showing signs of modest economic growth beginning only in 1984. Nonetheless, the critical mass needed to nurture and sustain growth in these communities exists in their available labor force, their existing businesses, and in their public and non-profit institutions.

The Port Authority's **Bathgate Industrial Park** in The Bronx is emerging as a model of inner-city redevelopment through the cooperation of government, the community and the private sector. The four blocks of modern, single-story factory structures completed or under construction are designed for small, labor-intensive businesses that can draw on community residents for their workforces. All 12 blocks planned for the park will be completed by 1988, offering 600,000 square feet of industrial space that can support more than 1,500 jobs. Marketing staff within the Economic Development Department continue to identify potential tenants for the park and work closely with local organizations to make sure that the facility draws workers from the surrounding communities.

The **Port Authority Industrial Park at Elizabeth,** adjacent to the Port Authority's containerports at Port Newark and Elizabeth, has attracted its first tenant, which plans to occupy 66,000 square feet. Negotiations with several other tenants are nearing conclusion. Paving and utility work is under way on 86 acres of the 125-acre site. The site can accommodate as much as two million square feet of industrial space, sufficient to support 2,000 jobs.

Project initiatives such as the Newark Legal and Communication Center and Hunters Point waterfront development reflect goals of stimulating renewal in the region's urban core.

Project initiatives such as the Newark Legal and Communications Center and Hunters Point waterfront development reflect goals of stimulating renewal in the region's urban core.

A new **Industrial Park at Yonkers** is enabling the Port Authority to emphasize local economic development that relates directly to the agency's basic mission of maintaining transportation facilities at high levels of service. The Agency has leased part of the 21-acre site, acquired in 1985, to Nissho-Iwai American Corporation for a manufacturing and assembly plant for PATH cars being added to its fleet. This operation employs about 150 workers, many of them formerly unemployed Yonkers residents. Other buildings on the site house 13 local firms employing 300 workers. The 800,000 total square feet at the park are expected to support 2,000 jobs.

The new **South Ward Industrial Park,** undertaken in cooperation with the City of Newark and the Newark Economic Development Corporation, will apply many of the lessons learned at Bathgate to a community that has experienced problems similar to those of the South Bronx – but which also has many of the same strengths. Construction at the six-square-block site is expected to begin in 1988.

The Economic Development Department will continue to study other opportunities for industrial development in the region. During the next five years, it will focus on opportunities related to the Port Authority's other basic businesses – for example, airport-related industrial and commercial development – and on attraction of foreign investment to the region. Additional capital spending of about $75 million is estimated for the existing industrial parks beyond the approximately $35 million in P.A. funds committed at these sites before 1986.

A proposed **resource recovery plant in Newark** will offer an environmentally sound alternative to landfills now used to dispose of Essex County garbage. A private firm will design, construct and operate the facility, which will convert solid waste into thermal and electrical energy, then sell the electricity generated to local utilities. Work at the 25-acre site is scheduled to begin in 1987, and approximately $300 million is allocated towards construction of the project in the five-year plan.

The Port Authority received legislative authorization in 1984 to move forward with one project in each state to revitalize an underdeveloped urban waterfront district and, in cooperation with local governments in each state, is preparing master plans for the sites in Hoboken and the Hunters Point section of Queens. The agency would demolish existing structures where necessary and undertake site preparation projects such as paving and installation of connections for utilities. This preliminary work would set the stage for private sector investment in office, housing, retail and recreational development.

At **Hoboken,** professional planning and development consultants have prepared a preferred option development plan that calls for 1.4 million square feet of office space, 1,200 housing units, 150,000 square feet of shopping and recreation area in the first phase and the development of another million square feet of commercial office space in a second phase. Research and development space, a hotel, a marina and breakwater, a park and walkways and improved transportation access to the district are planned as well. The site is owned by the City of Hoboken and leased to the Port Authority.

Planning at **Hunters Point** is underway. Consultants have been hired to prepare a master plan, determine the best mix of uses for the site, prepare environmental impact statements and conduct site appraisal's. Conceptual development plans are being studied and land acquisition discussions are being held with owners of land to be part of the project. A preferred alternate master plan and two alternative options is also being prepared. The first site was purchased in September, 1985.

Between 1987 and 1991, the Port Authority plans to spend $175 million on these two projects out of a potential combined total agency investment of $250 million at these sites.

IV. OTHER COMMITMENTS

Other allocations in the five-year capital program include the balance of funds ($235 million) committed by resolution of the Board of Commissioners to support other regional development projects identified by the Governors of New York and New Jersey as making important contributions to regional development – for example, improvements of rail freight facilities in Bronx, and relocation of Conrail lines in New Jersey to facilitate development of the state's proposed waterfront light rail line. In addition, the five-year capital program allocates $150 million for regional development projects to be identified by the states in cooperation with the Port Authority.

Rounding out the overall $5.8 billion program is the remaining $50 million in the bus purchase program through which transit agencies in both states have made

substantial bus purchases, and a $70 million provision for emergency repairs as an agencywide reserve.

In addition to the capital program commitments, the Port Authority will advance approximately $400 million, at no cost to the agency, to the states over a ten-year period against future cash flows to the Fund for Regional Development. The Fund, established in the 1983 bi-state agreement, captures a portion of the revenues generated as the result of the moveout by New York State from offices in the World Trade Center. This money would be divided equally between both states, to fund specific capital projects identified by the states and authorized by the Port Authority.

V. EXPANDING ECONOMIC OPPORTUNITIES

The Port Authority is committed to carrying out its basic transportation and capital development responsibilities in ways that expand the opportunities available to residents of and businesses in the New York-New Jersey region – especially to those who have too long been left outside the mainstream of the metropolitan area's growing economy.

Most existing Port Authority facilities and the bulk of its proposed capital investments are concentrated in the region's relatively disadvantaged communities, and these new investments, coupled with generally rising patronage at its facilities, will create new economic opportunities for area residents and small businesses.

The PATH capital program, the JFK 2000 and NIA 2000 projects, and other investments planned in the

program will generate thousands of construction jobs, and the new and expanded facilities will accommodate many new permanent jobs as well. As reports recently published by the Port Authority have shown, these new jobs will be created against the backdrop of a regional labor market that is expected to become much tighter during the remainder of the decade as the rate of labor force growth declines.

A tighter labor market could present some problems – for example, possible shortages of skilled personnel in certain construction trades – but it could also provide even greater opportunities for employing disadvantaged residents of the region. The agency currently is analyzing the local labor market outlook for job categories related to its capital program. During the next five years, the Port Authority will continue its aggressive commitment to affirmative action and training, but it will also pursue innovative approaches to expanding the range of opportunities available to minority group members, women and unemployed community residents.

The capital program also can provide opportunities for economic development and job creation in some of the New York-New Jersey region's economically distressed communities. In implementing its capital programs, the Port Authority will make every effort to use its purchasing power to bring jobs to the region. Port Authority investments already have begun to generate these benefits – for example, through the establishment of a rail-car manufacturing plant in Yonkers to supply new cars for the PATH system, and by contracting for rehabilitation of

older PATH cars in Brooklyn. The Port Authority industrial park program and the Newark Legal and Communications Center project both include special efforts to reach out to local residents in filling jobs created by these projects. The agency will seek to develop other such opportunities where feasible for additional elements of the capital program during the next five years.

The Port Authority will also continue, through its operating, contracting, and procurement policies, to expand small business opportunities for minorities, women and others within the region. Several notable efforts are already underway. The Airport Services Development Office in Queens, which is funded by the Port Authority, has helped Queens firms obtain new contracts totalling $4 million to supply goods and services for the aviation industry. A similar program has been authorized based on Newark International Airport. Minority business development efforts by the Port Authority emphasize contracting with minority-owned architectural and engineering concerns as well as construction firms.

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Production
Joe Cuciniello
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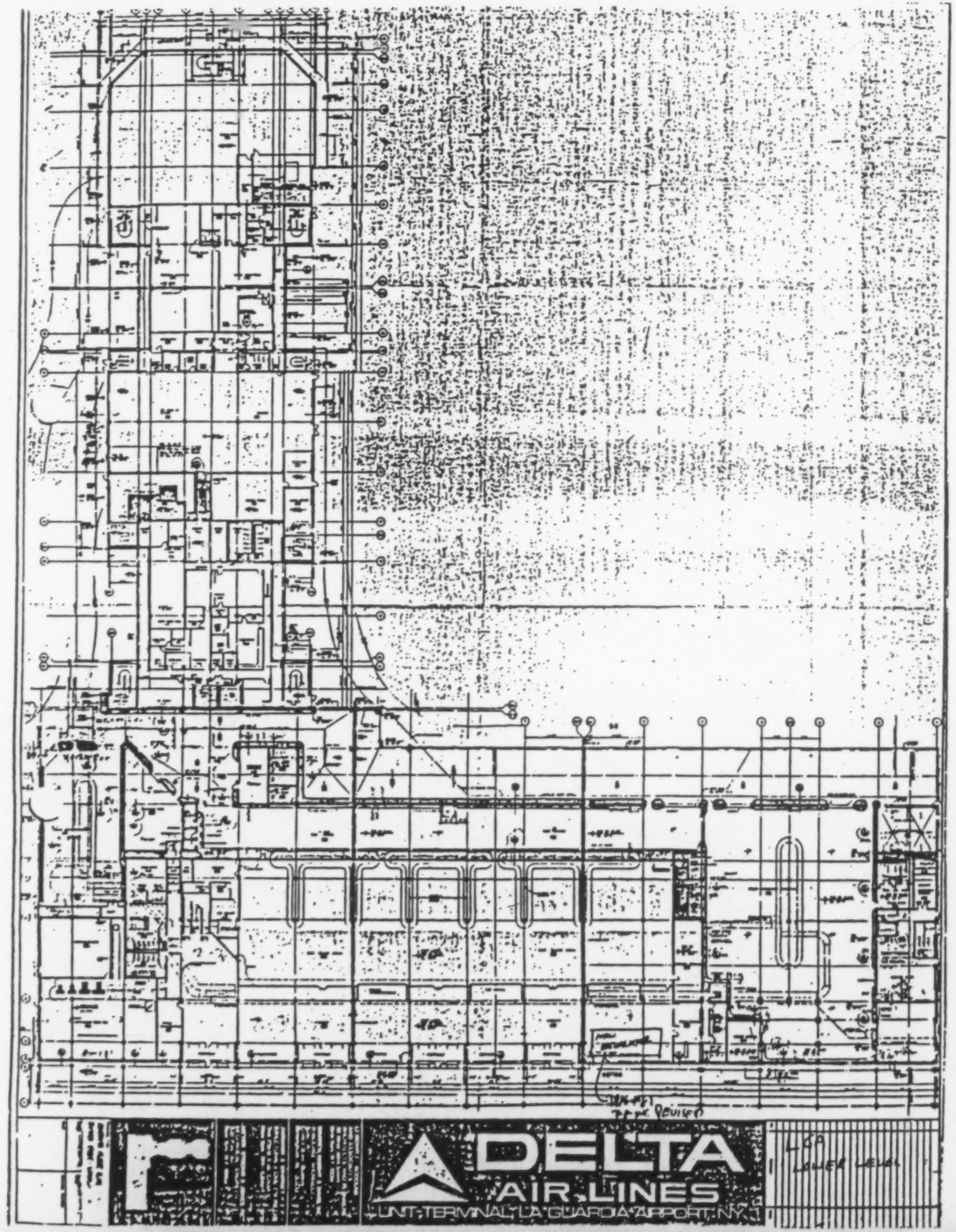
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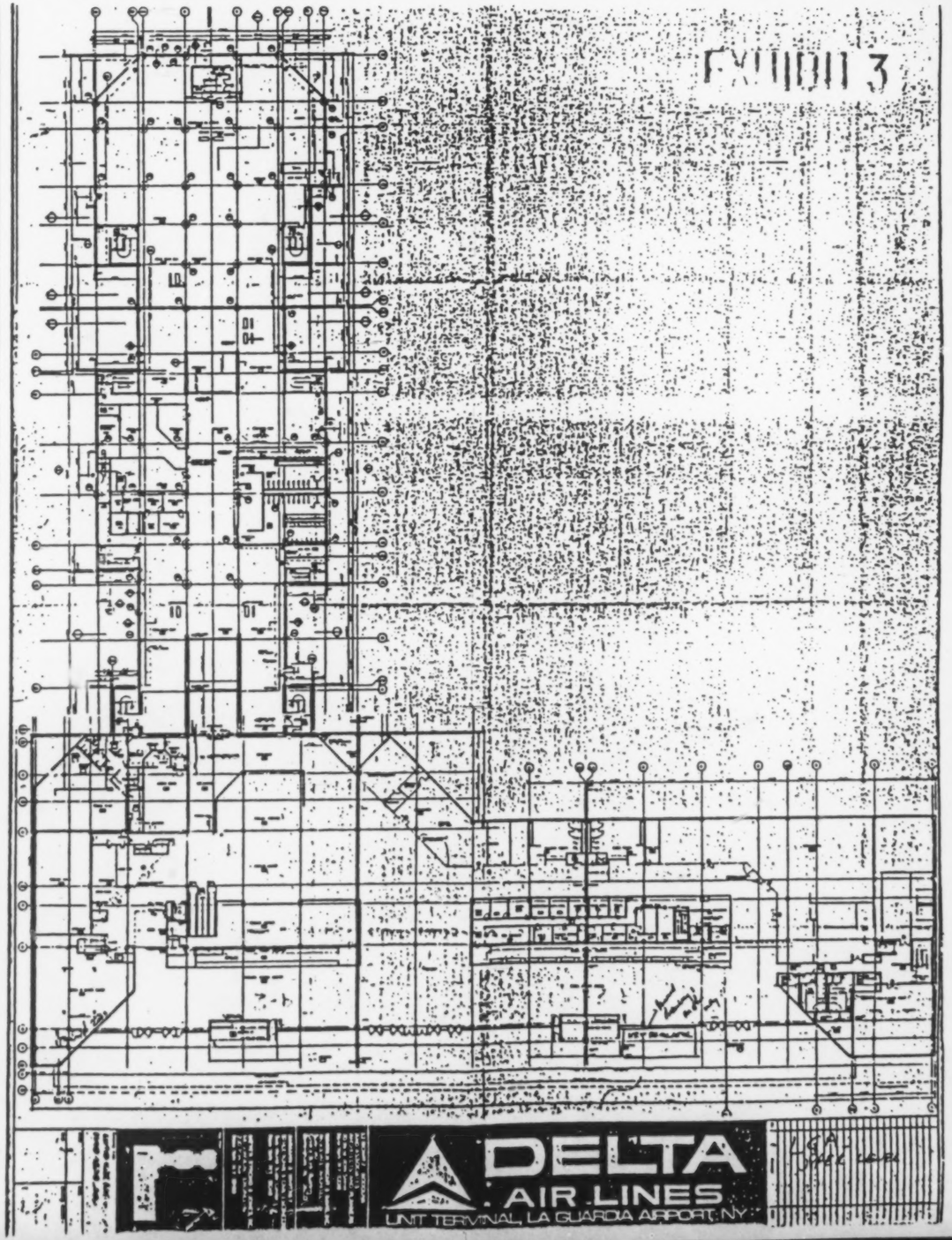
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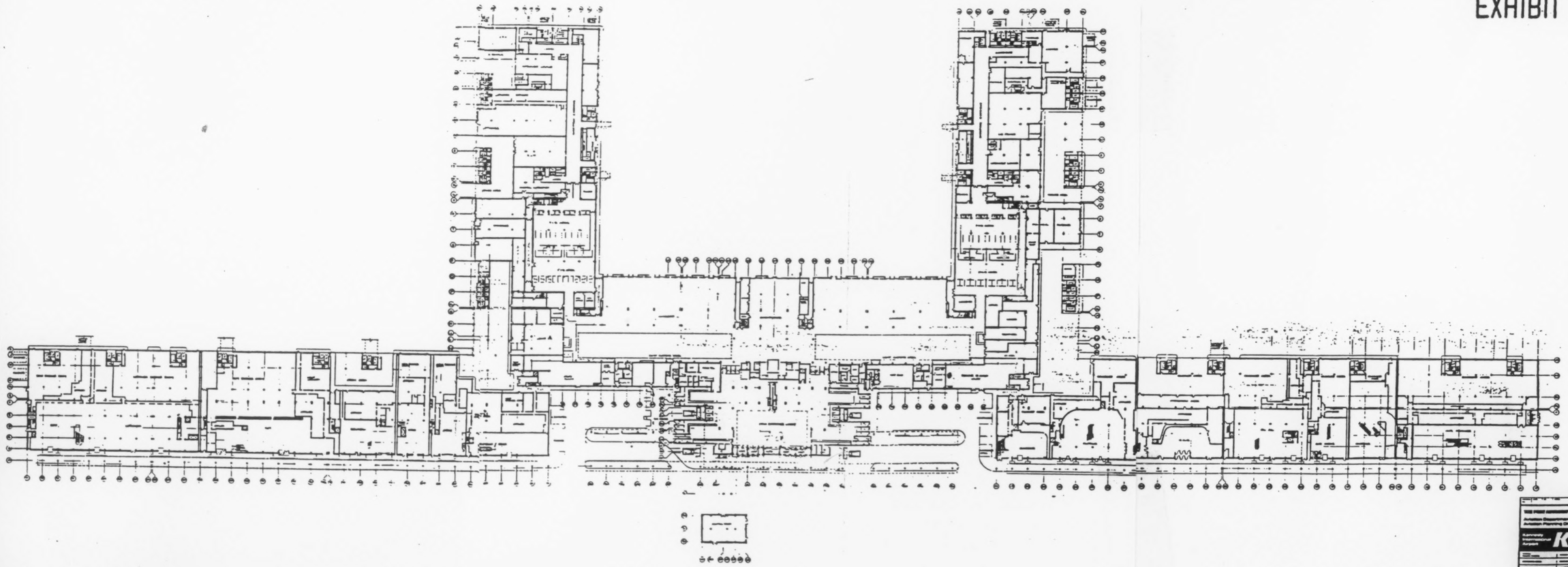

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FIRST FLOOR PLAN
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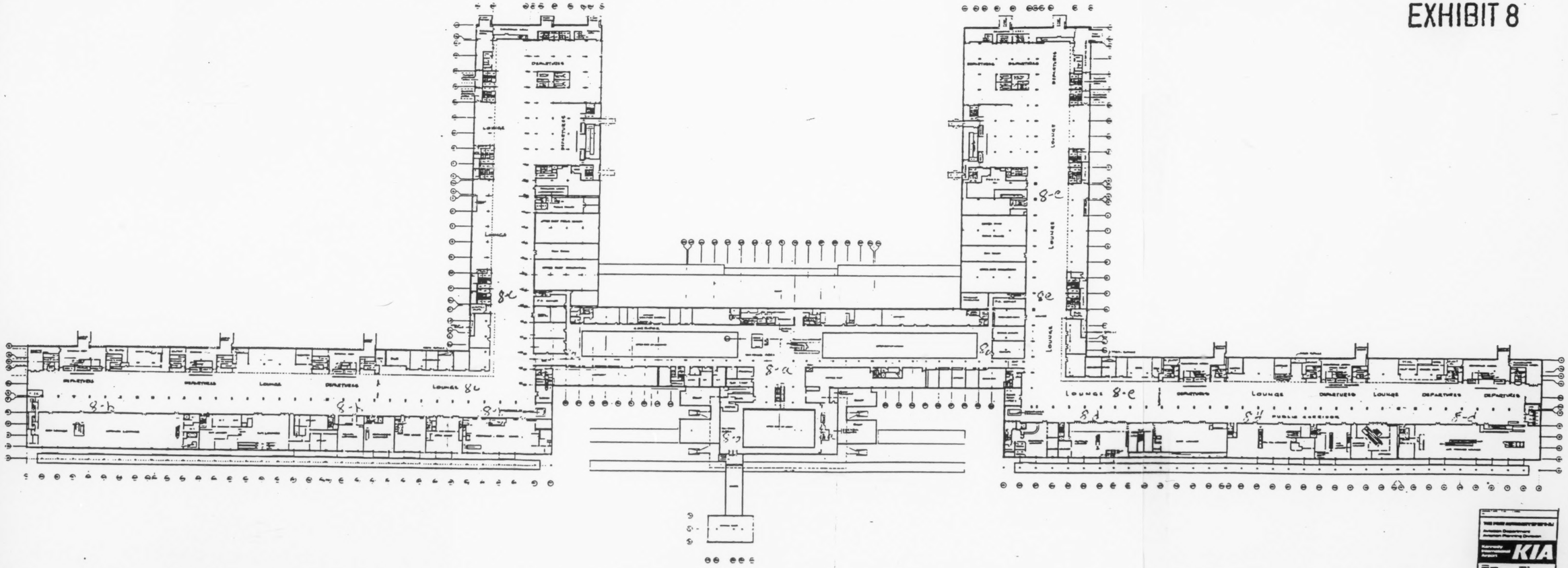

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SECOND FLOOR PLAN
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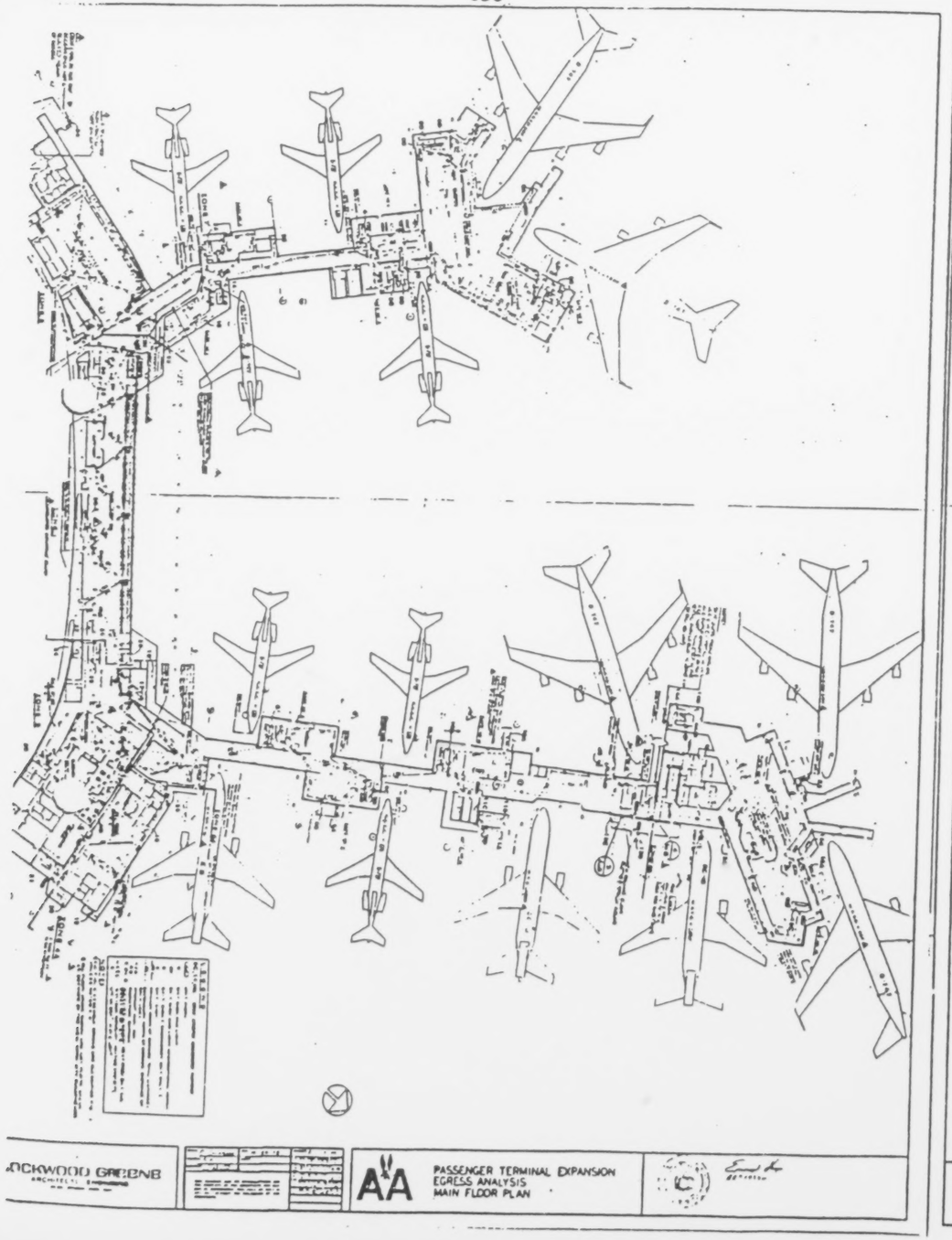
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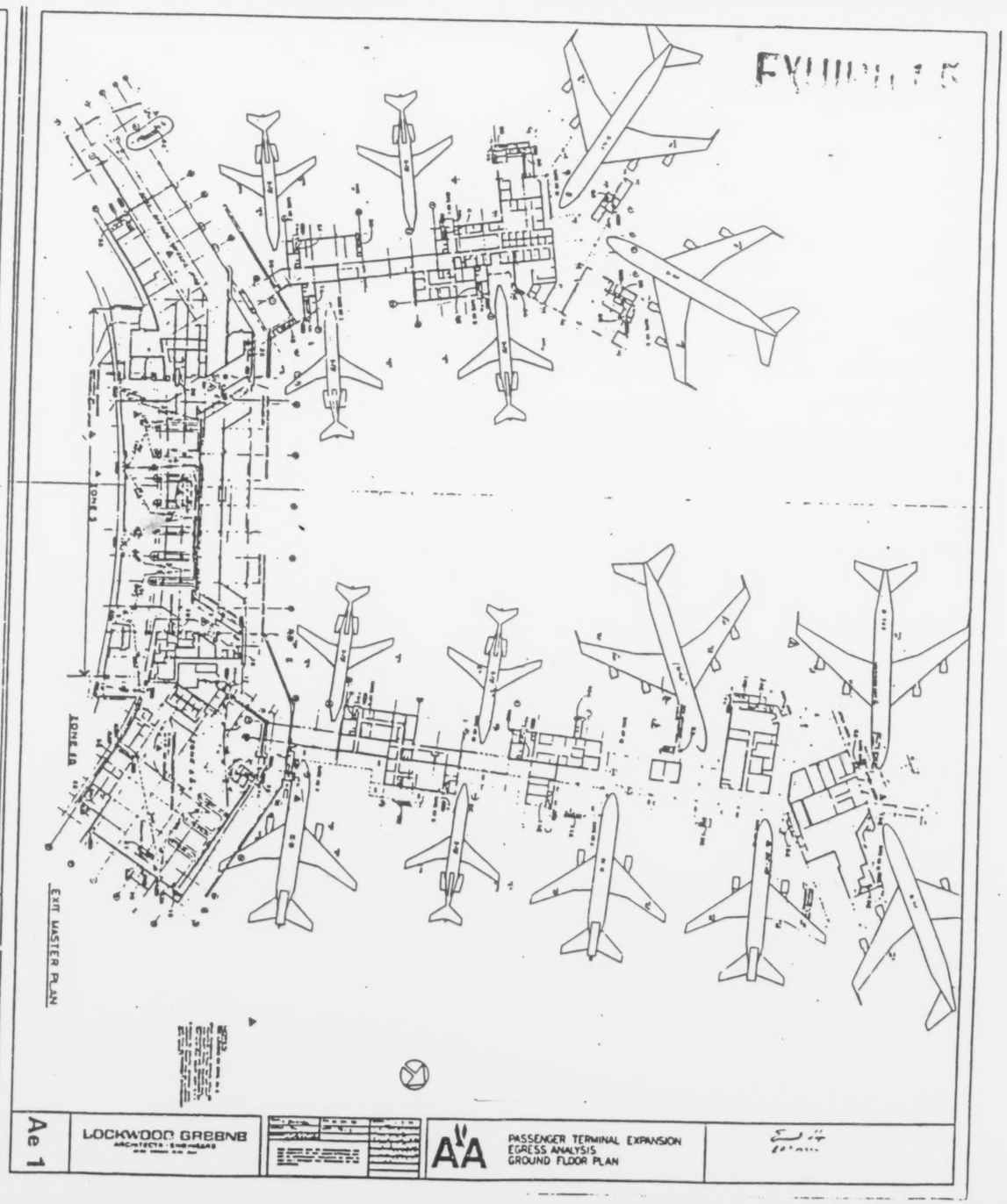
EGRESS ANALYSIS
MAIN FLOOR PLAN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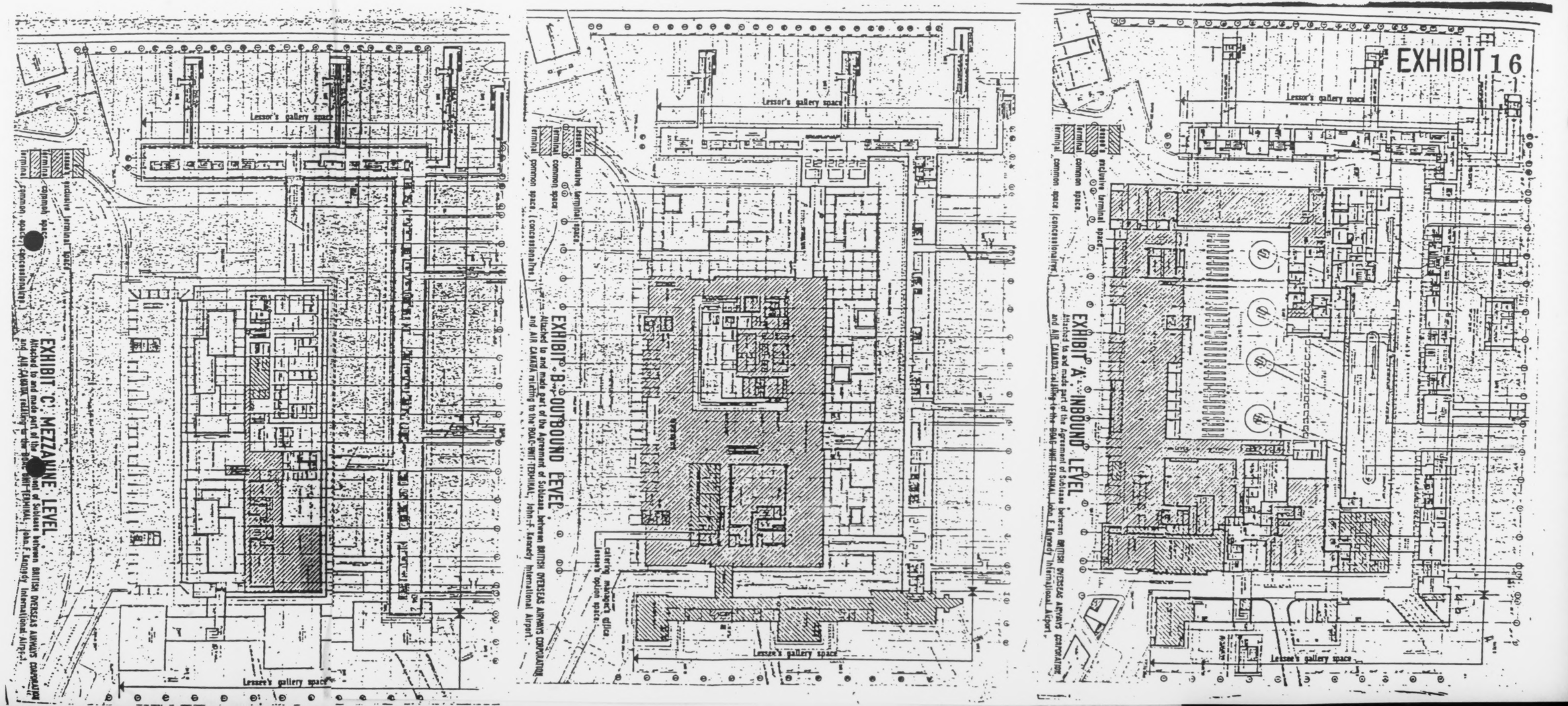
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Terminal common space (concessionaires)
Lessee's exclusive terminal space
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Lessee's gallery space
EXHIBIT "B" OUTBOUND LEVEL
Attached to and made part of the Agreement of Sublease between BRITISH OVERSEAS AIRWAYS CORPORATION and AIR CANADA relating to the BOAC-VHF-TERMINAL John F. Kennedy International Airport
Lessee's gallery space
EXHIBIT "C" MEZZANINE LEVEL
Attached to and made part of the Agreement of Sublease between BRITISH OVERSEAS AIRWAYS CORPORATION and AIR CANADA relating to the BOAC-VHF-TERMINAL John F. Kennedy International Airport
Lessee's gallery space

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Nos. 91-155, 91-339

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In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,

Petitioners and Cross-Respondents,

v.

WALTER LEE,

Respondent and Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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VOLUME II (Pages 292-551)

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park East,
Suite 3160
Los Angeles, California 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park East,
Suite 3160
Los Angeles, California 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson Street, N.W.,
Suite 520
Washington, D.C. 20007
(202) 337-2273

Counsel for Petitioners and Cross-Respondents

ARTHUR P. BERG
Counsel of Record

ARNOLD D. KOLIKOFF

MILTON H. PACHTER
Attorney for Respondent and Cross-Petitioner
One World Trade Center - 66E
New York, New York 10048
(212) 435-6830

Counsel for Respondent and Cross-Petitioner

Petitions For Certiorari Filed July 24, 1991 (No. 91-155), Aug. 26, 1991 (No. 91-339); Certiorari Granted Jan. 10, 1992

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1986 Airport Highlights
John F. Kennedy International Airport
Newark International Airport
LaGuardia Airport

1986: Rebuilding to Meet the Challenge of the Future

The year 1986 will be remembered as a pivotal year for the airports serving the metropolitan area, a year in which The Port Authority of New York and New Jersey developed a multi-billion dollar capital plan to rebuild and modernize Kennedy, Newark and LaGuardia Airports.

Major components of the plan call for an expansion of the airport roadway systems, reconfiguration of a number of existing passenger terminals and construction of major new terminal facilities. Together, they will enable the airports to efficiently handle a 50 percent increase in passenger demand forecast to take place by the end of the century.

Together with expanded ground access and terminal capacity, capital improvements will be made to parking facilities, inter-terminal connections and baggage handling systems. There will also be an array of new services – restaurants, meeting rooms, communication and financial services, retail shops – that will make air travel to and from the bi-state region a more efficient and convenient experience for all travelers.

Equally significant to the redevelopment of the airports will be improvements to the capacity and quality of off-airport ground connections. To ensure that this aspect of airport service is achieved, a key element of the Port Authority plan will be promotion of high-occupancy vehicle and mass-transit options for travel to and from the airports.

The need for this extensive redevelopment of the metropolitan area airports was borne out in the region's levels of air passenger and cargo traffic in 1986. The tri-airport complex served a record 79 million passengers and handled more than 1.4 million tons of cargo last year. Both Kennedy and Newark recorded gains in cargo volume over the previous year. Increases in passenger demand occurred at Newark and LaGuardia Airports. A slight decline in passenger activity took place at Kennedy International. This was due mainly to the decline in overseas travel that took place early in the year. This situation at JFK had corrected itself to a great extent by the end of the year.

While major planning efforts continued throughout the year, construction projects moved ahead at all three airports. In addition, considerable effort was focused on increasing aeronautical capacity and reducing flight delays at the airports. As a result of continuing efforts with the Federal Aviation Administration and the airlines, the FAA will implement a comprehensive plan to

reconfigure and greatly expand the region's air routes early in 1987. It is anticipated that this program will reduce flight delays while providing for increased traffic capacity at all three airports.

Advances were also made during the year in achieving better utilization of airport gate positions. In 1986, work continued with airport tenants, local officials and the U.S. Immigration and Naturalization Service (INS) on reducing the processing time for arriving foreign travelers. Introduction of a separate inspection line for U.S. resident aliens and diplomats, increased staffing and training of federal inspection personnel, installation of computerized screening equipment and an expansion of passenger staging areas will contribute to marked improvement in this area.

While it has been an active year, we anticipate even greater challenges in the near future, as the Port Authority begins implementation of an ambitious capital construction program to revitalize the region's air transportation facilities.

1986 Airport Highlights

- Planning was completed for the major redevelopment and improvement of JFK, Newark and LaGuardia Airports
- Construction of Terminal C at Newark moved ahead, while two new cargo terminals were completed
- Pan American World Airways inaugurated shuttle service to Boston and Washington from LaGuardia Airport

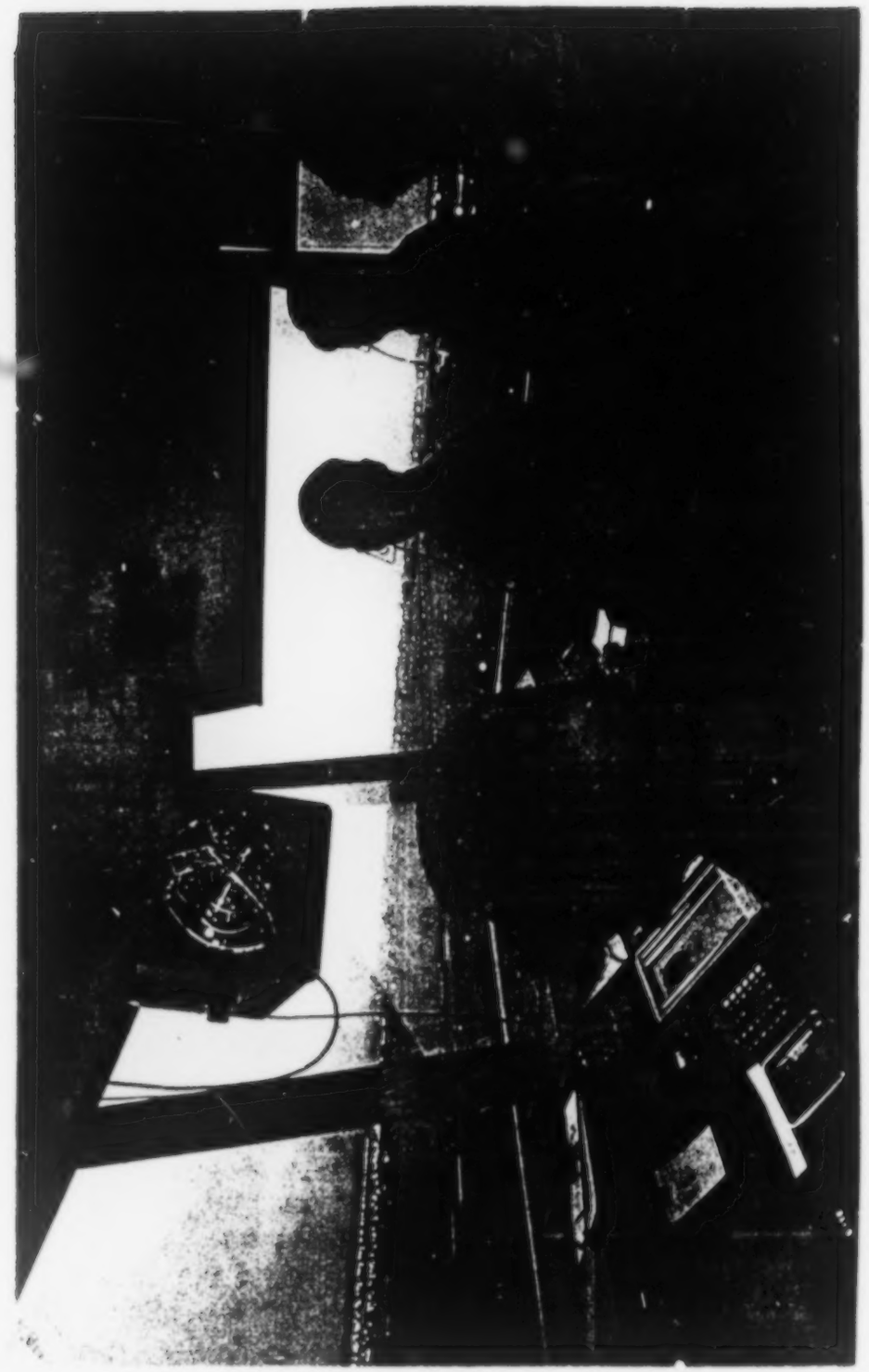
- Interior reconstruction of the Central Terminal Building at LaGuardia continued
- An improvement program progressed at the International Arrivals Building at JFK with new interline facility and conveyor system
- Construction began on two new cargo terminals at JFK
- The first U.S. international clearance center for air couriers and first U.S. central cargo examination facility opened at JFK
- Implementation of Air Cargo Fast Flow progressed with completion of system functional design
- Consolidated Ground Transportation Counters in service at all three airports
- Air traffic results 1985-1986

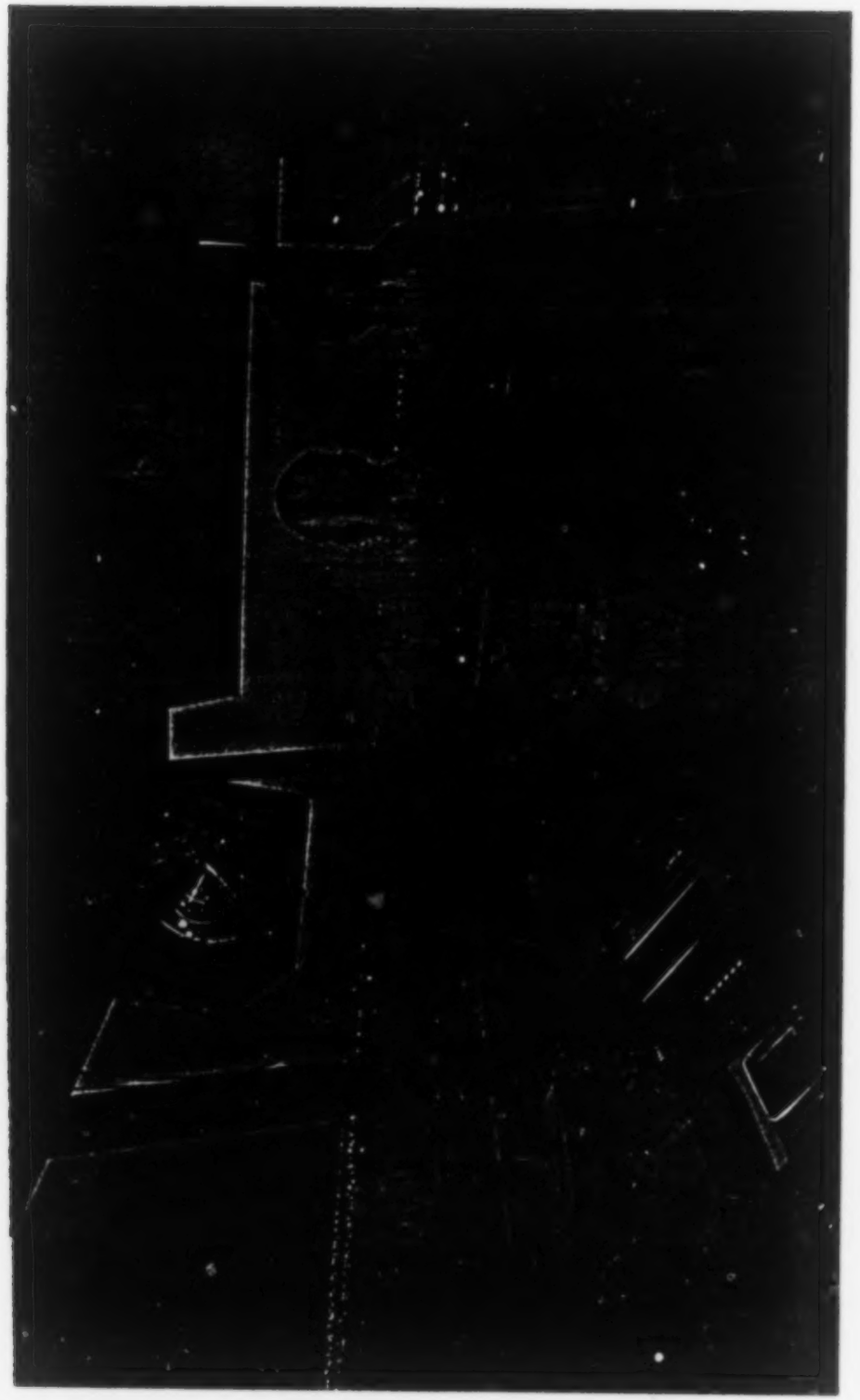
The Year at a Glance

	1986	Change From Previous Year
Passengers	78,846,000	+ 1.0%
Share of U.S. Domestic	7.8%	– 3.7%
Share of Trans-Atlantic*	54.4%	– 3.7%
Airline & Commuter Movements	934,000	+ 2.8%
Gen. Aviation & Air Taxi Movements	96,000	– 8.4%
FAR 36 Noise Compliance*	97.3%**	+ 3.4%
Air Cargo Tons	1,445,000	+ 2.6%
Share of Domestic Cargo Enplanements	7.8%	– 20.4%
Share of U.S. Airborne Foreign Trade	35.5%	– 8.9%
Number of Airlines (incl. commuter)	109	+ 1.0%
Employment	64,100	– 0.9%
Estimated Annual Payroll	$2.1 billion	–

*For nine-month period January-September 1986

**Remaining 2.7% consist of two-engine aircraft exempt from Federal regulations until January 1, 1988





Port Authority police officer aids airport patron. Travelers respond to airport questionnaire at JFK.

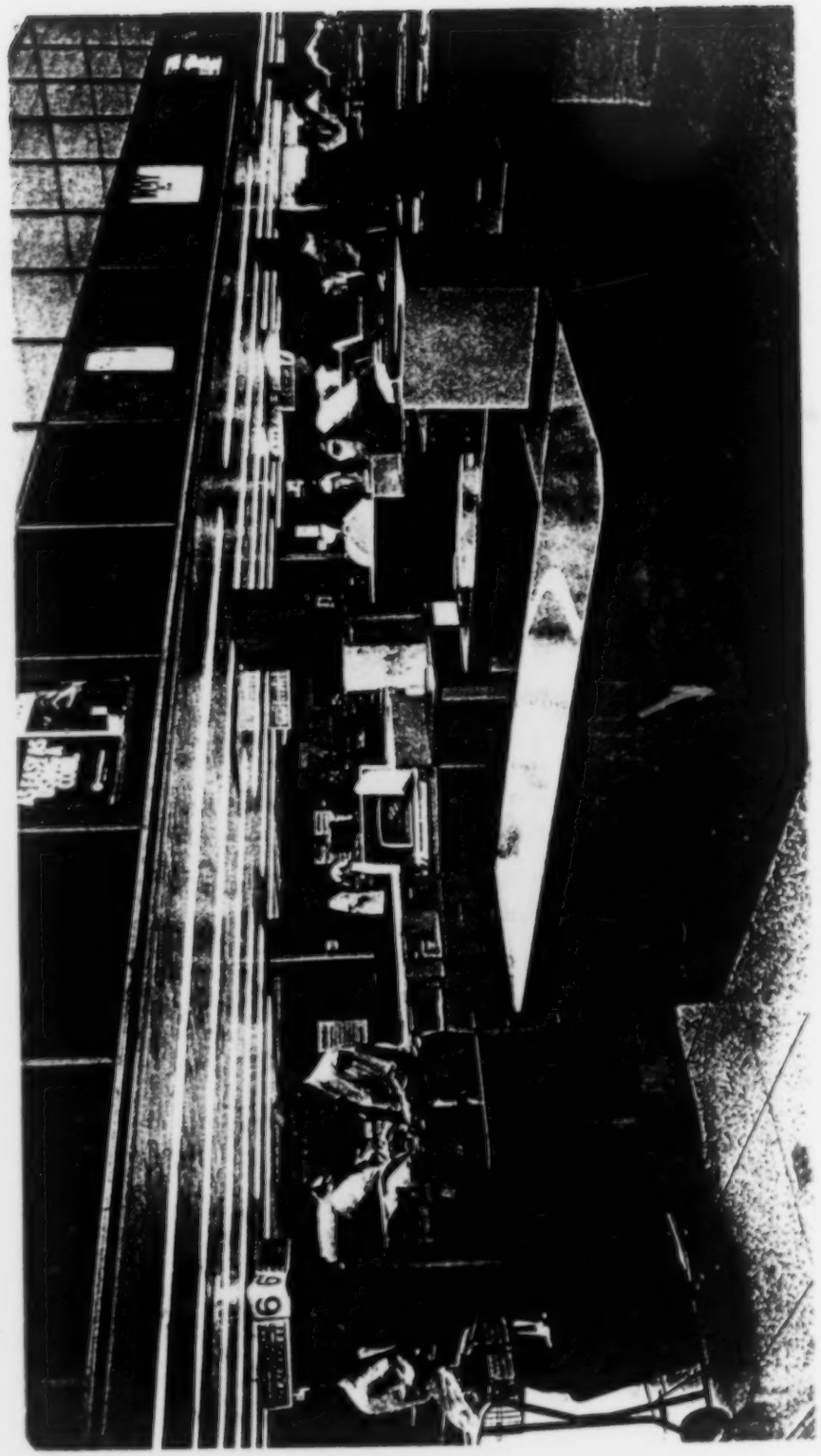
Ground Transportation and Terminal Services

The overriding goal of the Port Authority is to enable each airport to handle a significant increase in activity in an environmentally sound way. To this end, we are encouraging high-occupancy vehicle (HOV) use by actively seeking out new bus and limousine services to provide a broader range of transportation alternatives to and from the three airports.

Last year say Olympia Trails, which links Newark and Kennedy Airports, including a stop at the World Trade Center, start express bus service to LaGuardia Airport. At Newark, the Airlink coach service, which connects Newark Airport with mass transit hubs in downtown Newark, is now being operated by New Jersey Transit (NJT). To accommodate the increased passenger volumes, NJT has expanded operations to 20 hours daily with full size buses. Also at Newark, Connecticut Limousine has added extra stops to its routes and now serves portions of Westchester County, New York.

Another ground transportation service, started by Westchester Express, provides air travelers with shared door-to-door service from LaGuardia and Kennedy Airports to Westchester County. In addition, Long Island-Connecticut Limousine Group has started scheduled service between Long Island and the metropolitan area airports with three routes, serving the north and south shores of Long Island as well as mid-island destinations.

Vial to the proper functioning of the ground transportation services are the Consolidated Ground Transportation Counters in operation at all three airports. One is at JFK, seven are at LaGuardia and two are at Newark. Two

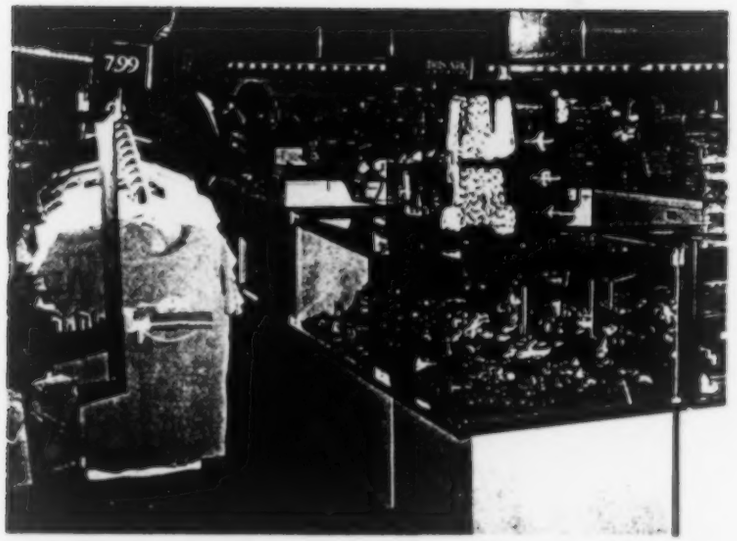


Sixty redesigned Customs counters were installed at JFK last year.

additional Port Authority counters are planned at Newark and six are planned for JFK, all of which should be operational in the spring. Staff at these counters provide travelers with a single impartial source of accurate transportation information and help them to make their ground transportation reservations.

Contributing to the effective use of public transportation to the airports is the Port Authority's AIR-RIDE telephone information service. Last year, a total of 70,000 calls were received, a 17 percent increase over the previous year. This toll-free service for the metropolitan area is operated on a 24 hour basis throughout the week, and provides detailed information about public transportation to and from Kennedy, Newark and LaGuardia Airports. As part of the system, a special toll-free information number is available only for the travel industry.

Port Authority plans include the development of "satellite ground transportation terminals" in Long Island and New Jersey. The terminals would offer parking and drop-off areas for air passengers who would then take regularly scheduled limousines and buses to the airports. This could represent an effective alternative for many air passengers who now use private automobiles. To initiate this service, the Port Authority issued requests for proposals during 1986.

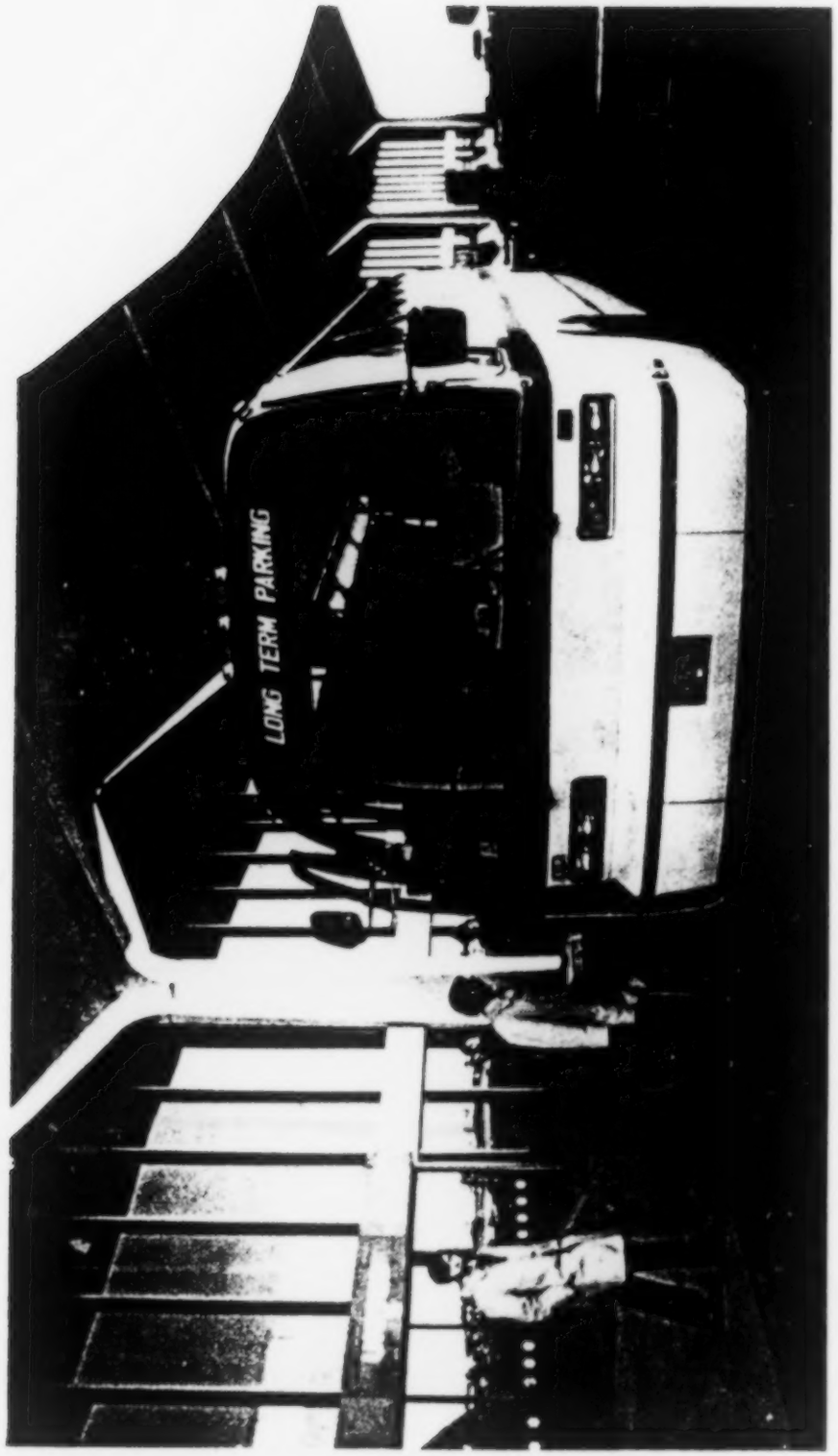


One of many convenient retail shops operating at the airports.

The Port Authority is also developing a ride-sharing program for JFK that would encourage airport employees to use high-occupancy vehicles for commuting to and from the airport.

Part of the effort to upgrade the three airport system includes improving mass transit access to all three airports, now and in the future. At Kennedy, for example, a new rail/bus station for the JFK Express train opened in the summer. Most significant are our plans for the future. The JFK 2000 plan is designed to improve mass transit use by creating a Central Terminal Area transportation center, where buses and limousines would pick up passengers after they had taken a two minute people mover trip from their airline terminal.

The Port Authority also plans to improve the connection between the Central Terminal Area and the Howard Beach train station to encourage greater use of the JFK



Free bus service is provided around the clock from the terminal buildings to the long-term parking lots at all three airports.

Express. The first phase of these improvements could include improved bus service – possibly an exclusive bus lane – from the train to the transportation center.

In 1986 the Port Authority, in conjunction with New York City officials, issued a request for proposal to establish a bus service from the LIRR station in Jamaica to both Kennedy and LaGuardia, to encourage further use of mass transportation for air passengers and airport employees. In addition, an extension of the Metropolitan Transit Authority's Q3 bus service into JFK will start this spring.

At LaGuardia, new connections to mass transit are being examined by the New York City Department of Transportation and the Queens Borough President's planning office. In addition, the establishment of a high-speed ferry service from Manhattan to the airport is under consideration.

At Newark, we are examining the possibility of providing a connection from the planned on-airport people mover system to regional public transportation systems. We also plan on giving preferential placement of high occupancy vehicles on sections of curb frontage. This is being done to enhance the level of ground transportation service provided to the traveling public.

An additional part of our ground access strategy is to reduce automobile congestion and delays by improving the roadway systems at Kennedy, Newark and LaGuardia Airports. Now underway at Kennedy Airport is a project to upgrade 150th Street into an expressway, thereby providing JFK with a second major entrance for traffic approaching from the east, including direct connections

Conceptual model of the JFK 2000 redevelopment program. Roadway construction at JFK.

to the major expressways adjacent to the airport. Upon completion in early 1988, this system of roads will enable more traffic to be diverted from the now overburdened Van Wyck Expressway, the airport's sole major access route.

Equally significant, the roadways in Kennedy's and Newark's Central Terminal Areas will be reconfigured and expanded under each airport's capital program. At LaGuardia, work will start on a major roadway improvement program next year in order to split airport traffic evenly between the Central Terminal Area and the East End Area.

We undertook several initiatives during 1986 to upgrade the quality of customer services. A comprehensive evaluation of all public food and beverage operations within the passenger terminals at the three airports was completed in 1986. This analysis is designed to achieve immediate improvements to existing establishments, as well as to develop a more consumer-oriented direction for airport food services over the longer term.

During 1986, we also added to the quality and variety of merchandise sold at the metropolitan area airports, with the opening of two Bloomingdale's stores at JFK. One is in the International Arrivals Building, the other in the Pan American World Airways Terminal.

The Future of John F. Kennedy International Airport

During 1986, work was completed on plans to rebuild John F. Kennedy International Airport, to enable the

airport to efficiently handle a fifty percent increase in passenger growth expected by the year 2000. The total cost is estimated at between $2 and $3 billion.

Early in 1986, PRC Engineering, Inc. and I.M. Pei & Partners delivered to the Port Authority a master functional plan for the redevelopment of JFK. At our request, Bechtel Civil, Inc. undertook a constructibility review of the plan. Bechtel concluded that the JFK 2000 program was feasible as planned, the proposed eight-year schedule was practicable and the project's construction cost would be within the estimated range.

Incorporating their comments along with input from the airlines, the federal agencies involved, transportation operators and the Urban Land Institute (an independent organization which conducts research into urban planning), the Port Authority finalized its plans for rebuilding Kennedy International Airport. The agency will be working closely with local officials and communities to assure that the needs of airport-area communities will also be considered throughout this massive rebuilding effort.

The heart of the new JFK plan is a speedy, high-tech system for transporting travelers and their baggage between airline terminals. A fully automated Passenger Distribution system will be designed to shuttle passengers between the terminals and the centrally located Transportation Center by the use of state-of-the-art automated vehicles traveling on elevated guideways. The Transportation Center will serve as a front door for the airport, providing a convenient terminal for patrons arriving or departing the airport by various transportation modes. At the same time, it will also provide quicker,

more convenient transfer service for passengers connecting between terminals. A user friendly baggage handling system will also be designed to improve speed and reliability for all passengers, but especially for interline passengers.

The Transportation Center, to be located in the heart of the Central Terminal Area, will be connected to the International Arrivals Building by a new and enlarged Federal Inspection Services Hall designed to handle up to 6,000 passengers per hour, double its present capacity. This linking of the Transportation Center and the IAB is expected to provide for better pedestrian flow patterns and an improved level of passenger service.

The Transportation Center may include such additional services as restaurants, shops, a business service center, a new heliport, a new air traffic control tower and possibly hotel and conference facilities.

Another important aspect of the JFK 2000 plan involves the capability of the passenger terminal buildings to handle the expected increase in air passenger traffic. Ongoing efforts to address this issue include the acquisition of a computerized gate utilization model to help determine future gate requirements, as well as improvements and expansions to the existing terminal facilities.

While design and construction proceed on various elements of the master plan, several projects are being carried out to provide service improvements to both the International Arrivals Building and the airport roadway system, as well as upgrade the level of mass transit service to the airport. These include a joint program with New York State to provide a second major entrance to the

airport at its eastern approach, a comprehensive improvement program for the International Arrivals Building, and improvements to the JFK Express, the New York City Transit Authority's express train to the airport from Brooklyn and Manhattan.

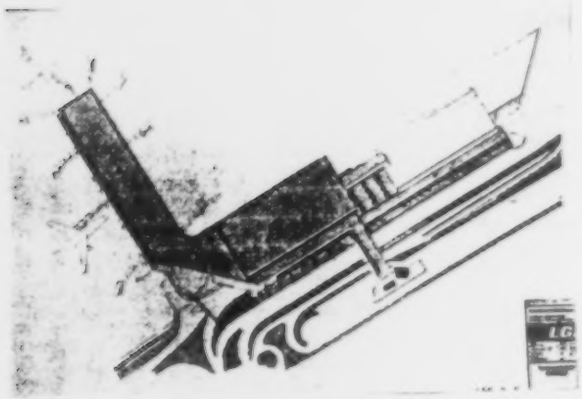
The 150th Street entrance to the airport is being rebuilt into a limited access, median separated expressway. Each direction will have two lanes, paved shoulders and parallel service roads for public use. Also included is a restricted service road that will connect the North Cargo Area to the airport's Central Terminal Area, thereby improving commercial access to Kennedy International. When completed in the spring of 1988, this system of roads is expected to eliminate much of the intermixing of slow moving aeronautical vehicles with normal traffic. Moreover, when combined with the new expressway (the JFK Expressway), they will provide a second major access route to Kennedy with direct connections to the Van Wyck Expressway, the Belt Parkway, and the Nassau Expressway. This is the first stage of a comprehensive reconfiguration of the airport roadway system.

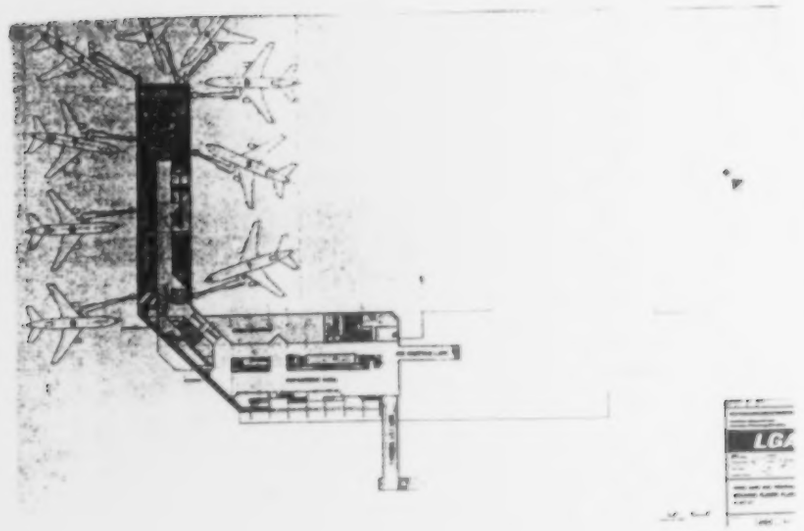
Future plans call for the reconfiguration and reconstruction of the Central Terminal Area's roadway network to increase efficiency and ease congestion. Direct roadway connections will be provided between each of the four main terminal areas and the two main airport access highways, the Van Wyck and JFK Expressways.

The $24 million renovation of the International Arrivals Building now underway will significantly upgrade the facilities there and is expected to be finished in 1987.

150th Street is being turned into an expressway at JFK with new connections to Nassau Expressway and adjacent roadways

Two views of conceptual plans for a new east end passenger terminal at LaGuardia.





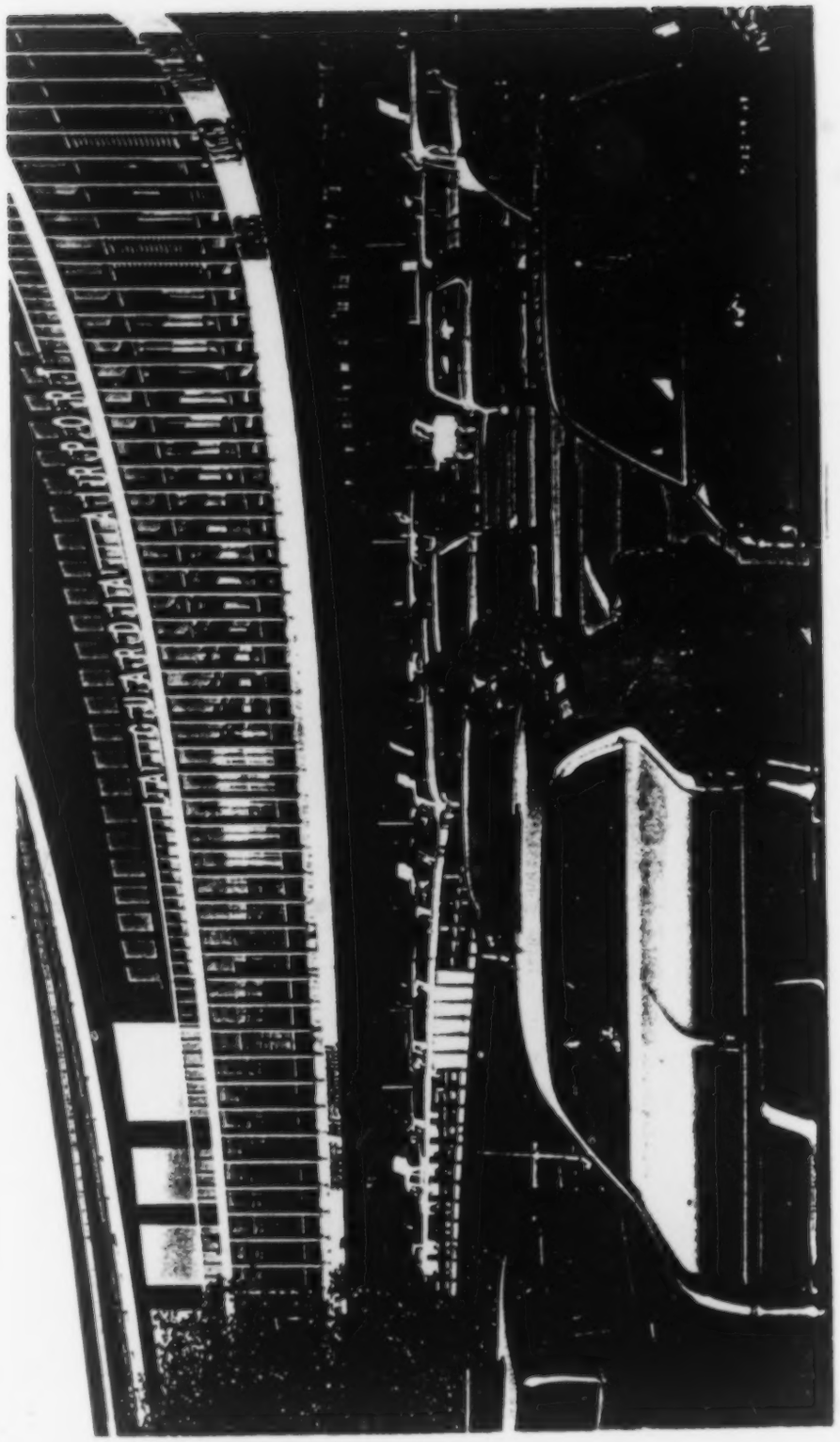
Already in operation is a new automated baggage conveyor system that dramatically improves the transfer of luggage between overseas and connecting domestic flights. The Immigration passenger processing areas are being expanded for greater efficiency and improved passenger flow. New Customs counters and lighting, better signs, additional restrooms and more escalators, are all designed to speed up processing for passengers at the International Arrivals Building.

In the summer, a new bus station connecting to the JFK Express train station at Howard Beach opened to travelers. The new station replaces a provisional facility that previously had served passengers who connected to the airport.

To complement the upgrading of terminal and transportation services, staff advanced with plans to maximize the airport's runway and taxiway capacity. Since airside capacity will be a key element in determining the future of Kennedy International, plans are focusing on ways to increase the flexible use of runways and taxiways and help to maintain Kennedy as the Nation's premier international airport.

The Future of LaGuardia Airport

Due to its proximity to Manhattan and wide choice of domestic flights, LaGuardia Airport is popular, especially with business fliers. In 1986, LaGuardia's compact site handled more than 22 million passengers. Current projections are for 30 million passengers by 1995-2000 – a 40 percent increase in passenger traffic. To accommodate this projected increase, the Port Authority plans to



Central Terminal at LaGuardia Airport.

At LaGuardia are 125 Apple Aides – volunteer senior citizens from the local area – who provide travelers with airport information.

improve the capacity, and efficiency of the airport through an ambitious modernization and development program.

Major components of the $300-plus million capital plan for LaGuardia Airport include reconstruction of the Central Terminal Building (CTB); construction of a new passenger terminal at the airport's east end; and a major roadway improvement program.

During 1986, work continued on the rearrangement of interior space on both the first floor Arrivals level and the second floor Departures level of the CTB. The current, highly compartmentalized terminal building layout is being opened up to create a more homogeneous terminal that will provide more space for passenger circulation and amenities.

Another important part of the plans for the Central terminal Area is provision of a direct entrance to the Parking Garage from 94th Street. This would eliminate the need for circling the Garage in order to enter, and thereby reduce traffic in front of the CTB. Construction for this segment of the plan will start in 1987.

On the Arrivals level of the CTB, the terminal's streetside window wall will be moved out by more than 20 feet along the entire length of the building, to provide additional space for patron circulation, ground transportation services and baggage claim areas. On the Departures level, work includes widening the roadways by at least an additional lane to reduce congestion in front of the CTB. Construction on both these projects is scheduled to start by 1989.

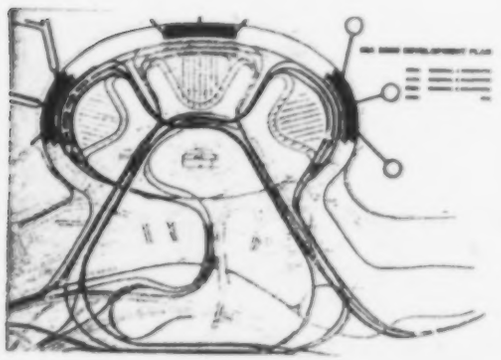
The new East End Terminal, to be used by one or more airlines, would be built adjoining the Eastern Airlines Shuttle Terminal. The terminal would consist of approximately 250,000 square feet of space on two levels and include all patron services facilities. Its construction, scheduled to start in 1990, should help to balance passenger traffic between the Central Terminal area and the East End area, and will be a key element in enabling the airport to comfortably handle projected increases in passenger demand.

Construction of a new East End Passenger Terminal will be complemented with a roadway program that will reconfigure and expand on-airport roads, while providing new access to LaGuardia's East End area with construction of new, off-airport roadway connections.

Starting in 1987, the airport East End roadways will be realigned and expanded to provided more efficient service to travelers. To improve airport access to the East End, off-airport road work will commence in 1990. Construction of ramps will tie in the 102nd Street Bridge as an exit and entrance to the airport. In addition, a new flyover roadway east-bound from the Grand Central Parkway to the East End Terminals (Delta Airlines, Eastern Airlines Shuttle and the planned East End Terminal), will allow the total separation of Central Terminal area and East End vehicle traffic and ease congestion on the Grand Central Parkway.

Late in 1986, air service at LaGuardia was augmented with the inauguration of Pan American's shuttle flights to Boston and Washington from a new wing of the Marine Air Terminal. (New York Air had previously provided the

Conceptual approach to Newark Airport development.
Construction at Newark's Terminal C.



same service from the Central Terminal.) Built by Pan Am on an expedited basis in early fall, the new terminal building includes four new gates and 40,000 square feet for patron services. Pan Am also provides shuttle passengers at its terminal with a courtesy bus that provides connections to the other terminals at LaGuardia.

The Future of Newark International Airport

Nineteen eighty-six was another banner year for Newark International Airport in passenger and cargo traffic. It was also a year in which Newark surpassed Kennedy Airport to become the region's busiest airport in the total number of passengers handled.

Passenger growth is expected to surge by fifty percent by the year 2000, and the Port Authority has developed a program of major improvements to enable these increasing passenger volumes to be served with quality and comfort.

The centerpiece of the Port Authority's program is an ambitious capital redevelopment plan to improve Newark International Airport, known as NIA 2000. The NIA 2000 plan reconfigures the airport's roadways, parking lots and terminal frontages to provide an optimum balance between airside development and landside access, providing for maximum flexibility and expansion to accommodate future operational needs.

The major elements of the NIA 2000 plan include modifications to the airport's main entrance and exit roadways; reconstruction of the roadways in the Central Terminal Area, serving each individual terminal; and a

people mover system to enhance the level of service between Terminals A, B, and C and the existing long term parking lots. The people mover will also be capable of connection with off-airport transit systems in place or under study.

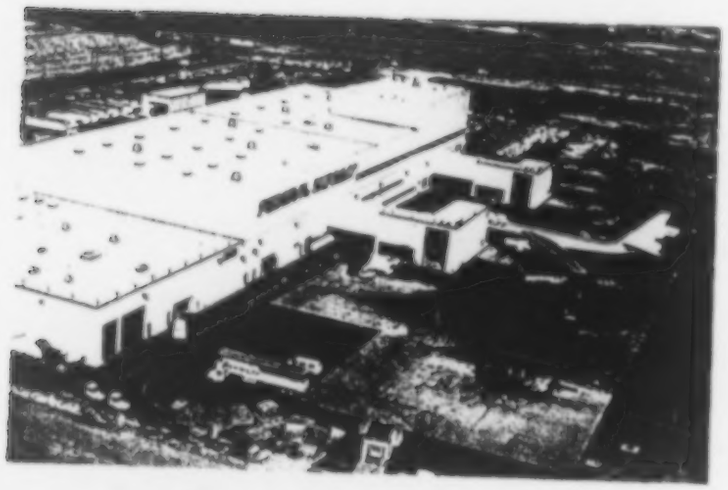
Other elements of the redevelopment program include dualization of roadways in front of each terminal, with priority in accommodating high occupancy vehicles; and construction of structural parking within the CTA, with direct access to and from the terminal frontages.

While not part of the NIA 2000 plan, a principal project currently underway is the construction of Terminal C, the completion of which will contribute 42 new gates and 850,000 additional square feet of space for expanded service. At year end, more than two-thirds of the project's construction had been completed, and we expect the terminal to be operational in 1987.

As an interim improvement measure, construction started on an additional lane to the existing express road, which will facilitate vehicular access to and egress from Terminals A, B and C. Construction is scheduled for completion in 1987. Modifications are also planned to provide public access to the new terminal's parking level frontage.

Work began in 1986 to reduce roadway congestion, especially in front of the terminals, including construction of a ground transportation stack area for taxis and limousines. Additionally, completion of Parking Lot F this fall will provide 3,000 more long-term parking spaces, bringing the airport's total parking capacity to 23,000 cars. In other work at Newark International, we initiated a new precashiering system that saves time for parking patrons by

At Newark, Federal Express opened its new Metroplex while the Port Authority opened a new cargo terminal.



allowing pre-payment in the terminals for cars parked less than 24 hours. Existing delays for those parked on a hourly and daily basis were also reduced with the construction of three additional toll lanes in the Central Terminal Area. Further improvements are planned for 1987 with the construction of six additional toll lanes in the CTA.

Newark International is fast becoming a major terminus for the small package carrier industry, a fact borne out by construction undertaken at the airport during 1986. Two new cargo terminals were completed, one by the Port Authority, a 50,000 square foot warehouse and office building, the other the regional headquarters for Federal Express., A third terminal is now being constructed by United Parcel Service on an expedited basis, and is expected to be completed in the spring of 1987. Last year, we also began planning to establish a centralized cargo examination facility at Newark to expedite the clearance of international cargo.

Overleaf: Terminal C will provide 42 new gates and 850,000 square feet of space for expanded service when completed in 1987.

The Future of Air Cargo

As air cargo continued its growth in 1986, the Port Authority moved ahead with a five year program of capital improvements at all three airports. This 100 million dollar program in 1986 has already produced new

cargo terminals at Newark and construction of additional cargo terminals at Kennedy.

Last year was also a period in which great strides were made advancing Air Cargo Fast Flow, the Port Authority's computerized inventory control and clearance system. Finally, the Port Authority opened two buildings at Kennedy International which marked a first for U.S. airports – the first international clearance center for air couriers and the first central cargo examination facility.

The combination of these capital and service improvements will increase the cargo handling capabilities of the three airport systems, and enable Kennedy, Newark and LaGuardia to efficiently process the more than three million tons of cargo expected per year by the end of the next decade.

Kennedy International, already the world's biggest and busiest cargo airport, is forecast to more than double its present cargo volume by the year 2000. To provide the airport with the most modern facilities and services to process these increasing cargo volumes, the Port Authority began a major building program in the airport's North Cargo Area in the spring with groundbreaking for a $20 million cargo terminal complex. The two new terminals are being built by King Interests, the nation's largest third-party air cargo developer, which will also operate and sublease the facilities. The first building of 175,000 square feet has already been leased and is expected to open this year. The second facility of 200,000 square feet is scheduled for completion in 1988. When both facilities become operational, they will be able to accommodate four Boeing 747 freighters.

The airport's North Cargo Area will be host to a second facility scheduled to start construction in 1987. The $13 million Halmar Equities building will be located adjacent to Springfield Gardens for freight forwarders, agents and brokers who do not require ramp facilities. The 200,000 square foot project combines requirements for both cargo processing and office space. It will consist of 100,000 square feet of warehouse space on the ground floor, with 41 truck docks, and 100,000 square feet of office space on the second floor.

Other initiatives at Kennedy International included a new international clearance center for 18 air couriers, which handle half the air courier traffic at Kennedy. (The remaining half is handled by DHL, which opened its own clearance facility at Kennedy in 1985.) The facility, located in Building 81, is now clearing between 750 and 800 bags of small packages per week. Its operation not only relieves congestion in the passenger areas, but expedites clearance for the air couriers and allows passengers to benefit from the shorter federal inspection lines and less congested roadways in the Central Terminal area.

In another effort at consolidating U.S. Customs inspection and clearance at the airport, the Port Authority and U.S. Customs opened a central cargo examination facility at JFK in the autumn U.S. Customs will release all cargo formerly cleared at numerous container stations located around JFK by selectively inspecting only high risk cargo at the control site. It is estimated that one-third of the 1.1 million tons of cargo handled at JFK will be processed at this 24,000 square foot facility in Building 88. Its successful operation will enable more container stations to be

licensed without an increase in Customs staff, as inspectors will not have to be assigned to the individual stations. The resulting efficiencies should attract more business for Kennedy, now and in the years to come.

ACCEPT, a joint Port Authority and U.S. Customs cargo automation program for the NY/NJ region, is in operation at 7 cargo terminals at Kennedy International, which together account for 50 percent of the airport's cargo capacity. Use of ACCEPT has reduced the number of inspections performed by U.S. Customs by nearly 70 percent by enabling the assessment of shipments as either high risk or low risk. This program is scheduled to be replaced this spring by the risk assessment component of U.S. Customs' Automated Commercial System (ACS), allowing for speedier cargo clearance for the entire import community.

Among the more significant changes in the regional air cargo market was the transformation of Newark International Airport into a major player in cargo handling. For the ten year period ending in 1985, air cargo volume at Newark International has grown from 112,000 to 274,000 tons. Last year, the airport handled almost 300,000 tons of cargo. The Port Authority estimates that by the year 2000, the airport's air cargo activity will nearly triple.

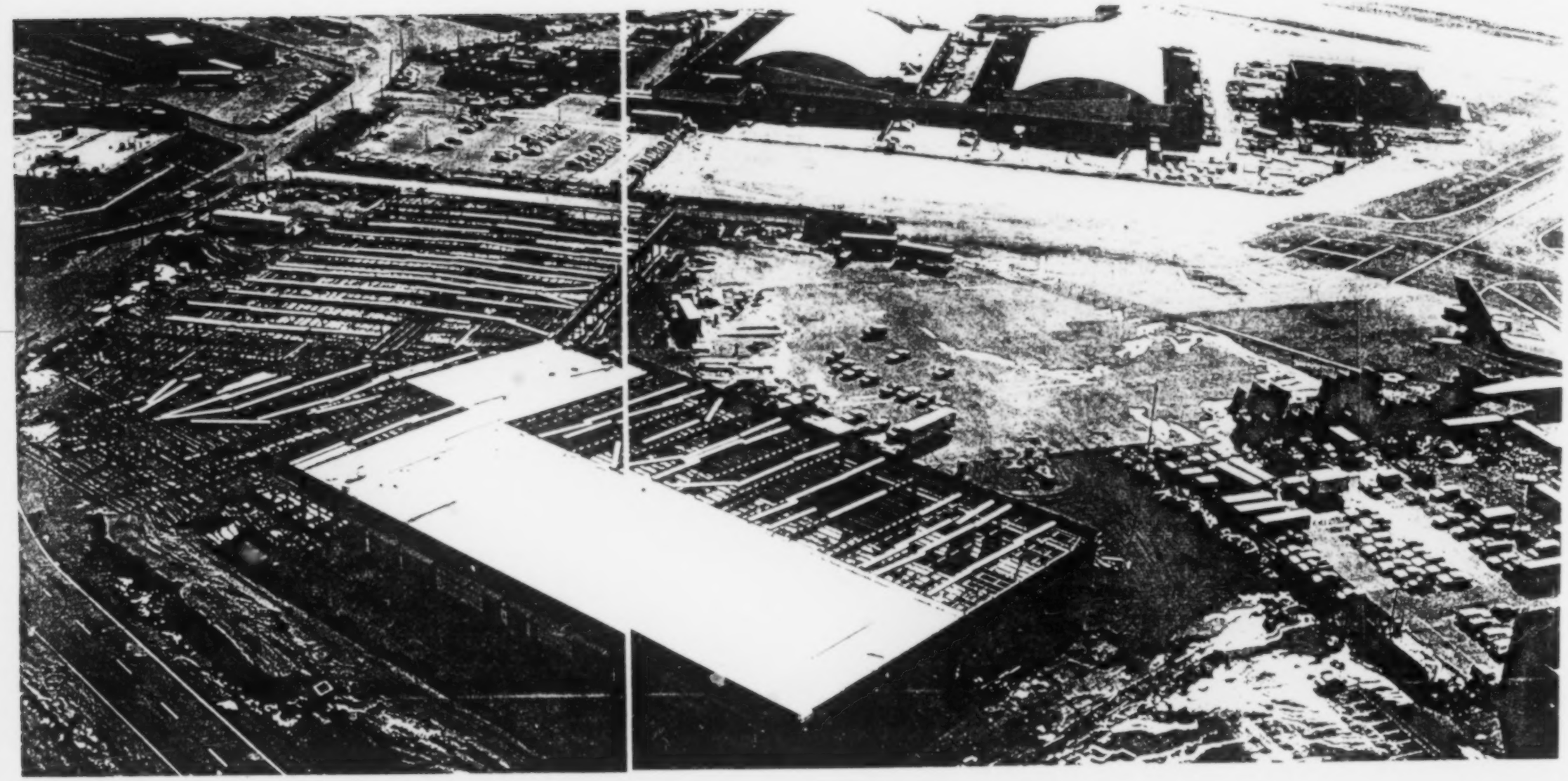
One of the major reasons for this resurgence is the phenomenal growth of the overnight small package delivery industry. Newark's early concentration on this aspect of air cargo service, as well as its easy access to and from the heart of the New York/New Jersey Metropolitan area, has made it the overnight small package and document center for the northeast United States.

Anticipating the importance of expanded and technologically advanced facilities to serve this market, Federal Express embarked upon the development of a huge and modern facility – the $53 million Metroplex Hub. The Metroplex, a regional sorting center for the northeast United States, is the first major facility outside the Federal Express headquarters in Memphis to be built on an airport.

The Metroplex, which opened early in 1986, houses a state-of-the-art document sorting center capable of handling 18,000 packages and documents per hour. Also new at the Metroplex are electronic transmission facilities and Federal Express offices, including substantial ramp and parking space for aircraft and container transport vehicles. All this has doubled the capacity of Federal Express to service its stations in 20 cities located throughout the region.

In another boost to the air cargo industry at Newark International, United Parcel Service leased 28 acres at the airport on which to construct and operate a major parcel distribution facility, expected to open this spring. The company's aircraft movements at Newark are expected to continue to grow from an estimated 1,550 movements in 1986 to some 1,800 by 1990.

Also significant was the mid-year opening of a cargo terminal constructed on the airport by the Port Authority. Now occupied by Virgin Atlantic, Continental and Summit Airlines, together occupying 50,000 square feet, the new facility is located within the cargo complex on the north side of the airport.



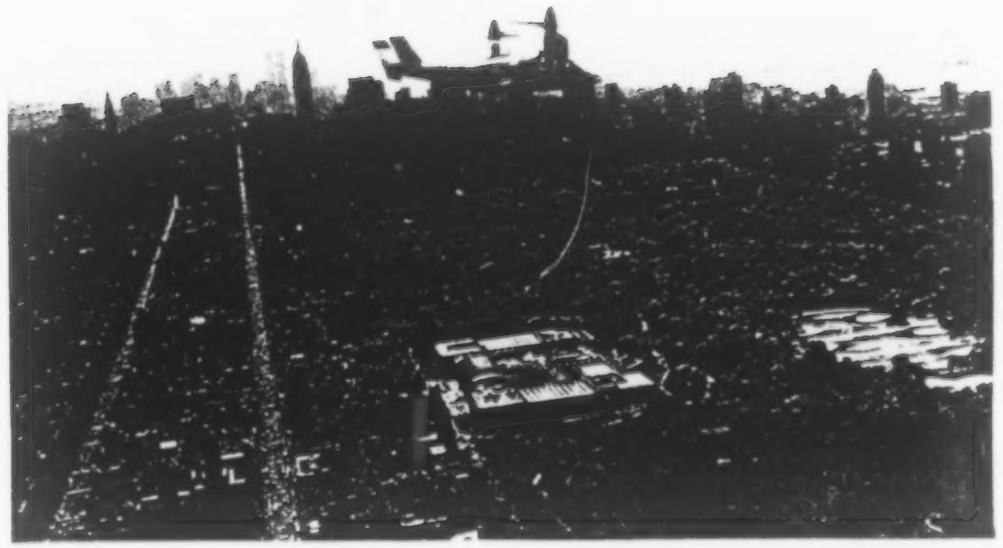
▲ Construction began on two new cargo terminals at JFK in the North Cargo Area

To enhance the efficiency of LaGuardia's capacity to handle current cargo operations, in late 1986 an operator began converting 35,000 square feet of hanger space into a cargo handling facility. Work included installation of truck docks; storage areas and refrigeration facilities for airlines already operating at LaGuardia.

Tying together the entire Port Authority Air Cargo Center will be Air Cargo Fast Flow. In June 1986, the Port Authority signed a contract with Arthur Anderson and Company to design and develop a state-of-the-art inventory control and clearance system for cargo, and to operate and maintain it for two years. When the system becomes operational this autumn, it will significantly reduce the time for processing of cargo within the region by allowing for real time communication between carriers, container stations and customhouse brokers, and by establishing an interface with ACS of U.S. Customs. ACFF is designed to allow for the creation of a paperless air cargo documentation process with more expeditious clearance. It will also enable electronic filing of entry declarations from brokers' offices, even while the shipment is en route.

By the end of 1986, the detailed functional design of the ACFF system had been completed and system programming had been initiated. When operational, Air Cargo Fast Flow promises to benefit everyone – importer, exporter and airline, Customs and customhouse broker, terminal operator and even the surface transport operators, who will now be able to achieve faster turn-around times for their trucks.

A vertical-takeoff-and landing (VTOL) aircraft in demonstration flight over New York.



The Future of Heliports

Helicopters will play a central role in the future of transportation in the New York/New Jersey region. A new heliport for Kennedy Airport will be an important feature of the master plan for rebuilding JFK. Another example of the Port Authority's commitment to helicopter service is the reconstruction and expansion of the Downtown Manhattan Heliport, now in progress.

When completed in the spring of 1987, the Wall Street Heliport will be one of the country's most modern heliports. The old Wall Street Heliport was closed in 1983 for complete reconstruction of the pier on which it was situated. Operations were temporarily relocated to the World Trade Center/Battery Park City Heliport.

The new heliport will have triple the parking area of the old one and be able to handle helicopters weighing 50,000 pounds. By contrast, the weight limit at the old heliport was 10,000 pounds. Further the new heliport is expected to handle additional scheduled flights to the airports, Philadelphia and to Atlantic City, New Jersey.

The project has been selected by the Federal Aviation Administration as one of four sites in the nation for a National All-Weather Demonstration Heliport that will equip the facility with state-of-the-art electronic and visual landing aids. The program will also formulate procedures for landing in poor weather that may eventually be applied to other heliports around the nation.

Work also progressed in 1986 on a Port Authority study investigating the potential of vertical takeoff and landing

(VTOL) aircraft as a means of alleviating airport congestion while increasing air transportation capacity at Kennedy, Newark and LaGuardia Airports. The use of VTOL aircraft promises to create totally new short-haul air transportation systems in the region, operating from city center to city center. This short haul market is estimated to be as much as 30 percent of the total at some air hubs.

Reconstruction of the Wall Street Heliport will triple its capacity when completed in 1987.

The particular type of VTOL aircraft being studied is commonly referred to as "tilt rotor." The aircraft combines the wings of an airplane with the rotors of the helicopter, an advanced design that is fuel-efficient, yet offers twice the speed and range of a helicopter. Consequently, it allows the craft to take off and land like a helicopter yet operate as a conventional fixed-wing aircraft in flight.

As part of the study, the Port Authority will investigate the viability of other types of aircraft as well as the cost

economics of aircraft, potential markets and carriers, regulatory controls and possible site locations for airports to serve VTOL aircraft. This effort, which is being coordinated with VTOL studies being conducted by NASA and the FAA, is to be completed this spring.

As part of this effort, the Port Authority cosponsored with the FAA a Civil Rotorcraft Forum early in 1986. Prominent leaders in industry and government attended the conference in order to assess the potential of tilt-rotor aircraft in creating a new major segment of the public air transportation system.

Airports and the Communities

The Port Authority continued in 1986 to be actively involved in issues affecting the bi-state region, as our community relations programs touched a wide audience with a broad range of activities. From employment to environment, from noise abatement to education, we are involved in a variety of programs to improve the quality of life in the New York/New Jersey region.

Efforts to alleviate the problem of flight delays made dramatic progress in 1986, as we worked with the airlines and the Federal Aviation Administration on a plan to restructure and expand the air space assigned to the three airports.

Late in 1986, the FAA implemented a preliminary phase of the plan at Newark International Airport. The next stage will be the restructuring of airspace along the East Coast this February. This expansion scheme will assign more departure routes to Newark, while redistributing

other air routes between Kennedy and LaGuardia. The FAA's Expanded East Coast Plan will offer parallel and alternate paths for aircraft now bottlenecked by single-route systems, and is expected to alleviate airport delays and improve safety.

In 1986, we initiated development of a Flight Track Monitoring System in cooperation with the FAA. Using radar information, the Port Authority will be able to monitor aircraft adherence to prescribed flight paths in an effort to reduce noise from flights straying over residential areas.

In the same spirit of achieving safer and quieter airport operations, the Port Authority is working closely with community groups and an outside consultant on assessing the design of a noise abatement wall, to be located along the western edge of LaGuardia Airport. This would reduce noise levels from both aircraft and ground operations.

A significant event in 1986 was the more "Stage 3" aircraft, employing new technology for quieter operation, began operating out of the three airports. This trend is expected to continue, as the major air carriers continue to upgrade their fleets with purchases of the latest aircraft models. The increased use of quieter widebody aircraft, which will carry more people per plane than in the past, leads the Port Authority to forecast lower noise levels despite the growth in passengers. At the same time, we are urging the federal government to establish a timetable for phasing out Stage 2 airplanes – aircraft that meet present noise standards but remain the root of the noise problem.

We also continued with our School Soundproofing Program during 1986. At present, 17 schools in New York and New Jersey, affected by noise from aircraft operations, are slated from soundproofing work at a cost of $17 million. This extensive noise abatement program is being carried out with the support of the Federal Aviation Administration through Airport Improvement Grants.

Port Authority tour guide accompanies community school children on airport visit.

Other efforts in the area of environmental protection continued to move forward during the year. The Port Authority continued its long-term environmental protection program at the three airports in order to minimize the impact of airport operations on the surrounding communities. Among these activities, we continue to bring together the Flushing Bay Task Force, made up of representatives from New York State, New York City, borough

agencies and community boards, to monitor projects and activities affecting Flushing Bay. Similarly, we have participated with various agencies and community boards near JFK in a Jamaica Bay Task Force.

Career opportunities were promoted by the Port Authority during 1986 with Career Days and Mentoring programs at the airports.

As the metropolitan area airports continue to be developed each year to keep up with rising demand, new employment opportunities are continually created. Some 65,000 people earned their livelihood at our three airports in 1986; more than 225,000 other jobs are generated in our region by the aviation industry and other businesses serving it.

To make sure that a fair share of newly generated jobs go to minority group members, the Port Authority participates with the airline industry in funding the council for Airport Opportunity (CAO), an organization that advances minority participation in the regional aviation industry. In 1986, the CAO placed more than 700 individuals in aviation related positions, and the aviation industry's continuing growth, along with our extensive aviation capital program, should dramatically increase career opportunities in aviation for residents of the bi-state region.

Another program aimed at stimulating the local economy is the Airport Services Development Office, which began operations in 1984 in Queens County. The purpose of the Office is to encourage the airlines and other airport tenants to patronize local businesses. The success of the Queens program led us to decision to fund the program for three more years, and to allocate funds to establish a similar program for the tri-county area surrounding Newark International.

In the areas of education and career development, we continue to sponsor Aviation Career Day programs both in Newark and in Queens, and conduct tour programs for student groups at the three airports. In addition, we continued to cosponsor with the FAA and local aviation organizations a three-year program on aviation career awareness, for students from kindergarten through the ninth grade. As a result, more than 2,400 students completed programs in aviation studies during 1986. The program, initiated at the request of Queens Community School District 27, is conducted at JFK.

Other educational efforts include a Career Bridges program at Newark International Airport and a "mentoring" program conducted by LaGuardia staff. At LaGuardia Airport, we also participate in the City-as-School Executive Internship Program, in which high school students are provided the opportunity to gain experience and on-the-job education about the world of aviation.

Considerable progress was also made during the year in upgrading security at all three airports. Efforts included increased inspection of facilities, equipment improvements and a new identification program. The Port Authority also worked with the airlines and other tenants, as well as law enforcement agencies such as the Drug Enforcement Agency, in special programs directed against solicitation and drug activities.

THE PORT AUTHORITY OF NY & NJ

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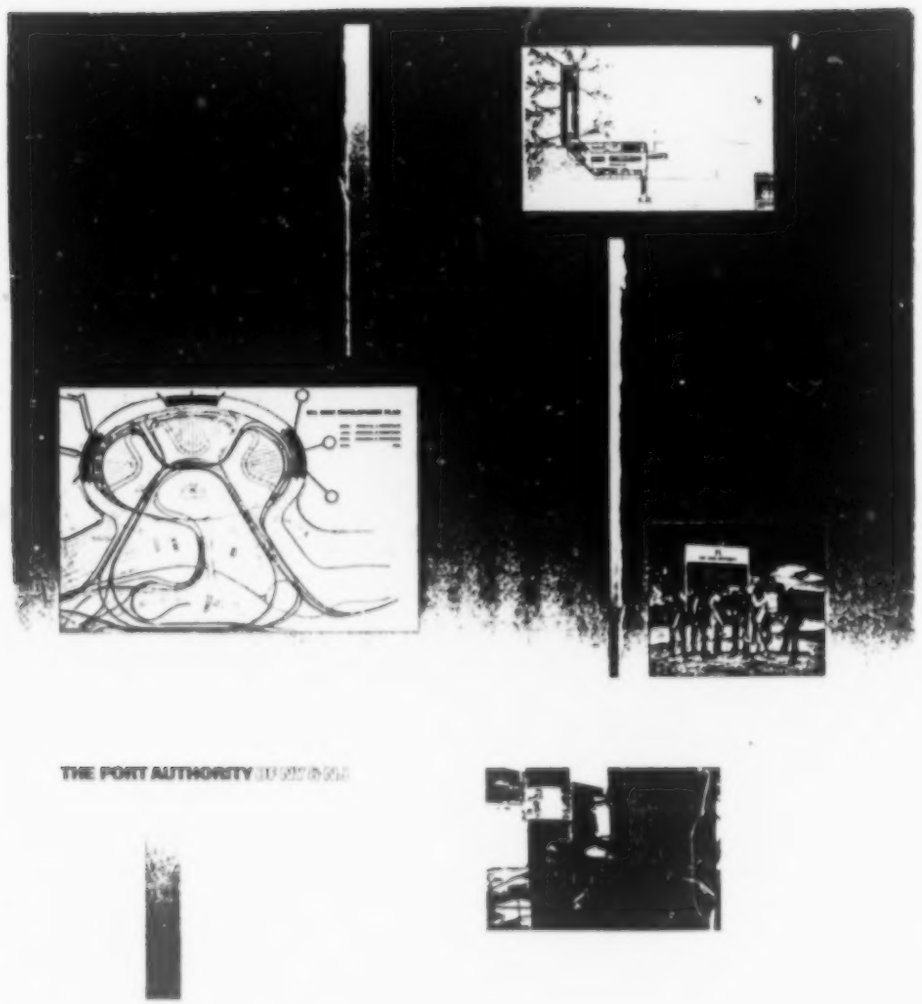
Port Authority Aviation Facilities

John F. Kennedy International Airport
LaGuardia Airport
Newark International Airport
Teterboro Airport
Downtown Manhattan Heliport
West 30th Street Heliport

Text: Gary Goldstein
Design: Mano Trombetta
Photography: Jerry Rosen, Randolph Waterman
Chris Sorensen, Michael Spozarsky
Cover: Mano Trombetta



THE PORT AUTHORITY

EXHIBIT 6

NEWS

THE PORT AUTHORITY OF NY & NJ

38-87 FOR IMMEDIATE RELEASE
March 12, 1987

The Board of Commissioners of the Port Authority of New York and New Jersey today took initial action to help finance a $5.8 billion, five-year capital program. The plan provides for improved interstate transportation connections, major improvements in the region's airport system, modernization of port commerce facilities and other developments supporting the region's continued economic growth.

Highlights of the program include:

. . . completion of the PATH rail system's rehabilitation and expansion program;

. . . a new passenger ferry service between Hoboken and lower Manhattan;

. . . rehabilitation of six major bridge and tunnel facilities;

. . . deeper channels and improved marine terminal facilities; and

. . . new "people-mover" systems at John F. Kennedy and Newark International Airports and other improvements at LaGuardia Airport to expand the capacity of the region's three major airports to handle forecast increases in patronage to the Year 2000.

Chairman Philip Kaltenbacher noted that, "In concert with the Governors, the Port Authority has put forward a

comprehensive investment plan that meets the region's growing needs for moving people and goods between the states and maintains the transportation and commercial facilities essential to the region's future economic health."

Chairman Kaltenbacher continued, "These investments will promote mobility within the metropolitan area and will help protect its pre-eminent role as American's aviation gateway, maritime-port, and national and international center of business and finance. They will be funded by the Authority on a self-supporting basis, without taxpayer subsidy."

"Key to the implementation of this program are the actions also taken today, pending public hearings, to adjust tolls and fares on the Port Authority's interstate transportation network of vehicular crossings and transit facilities," the chairman said. "The increased revenues would bring this network – now operating at a deficit – closer to levels approaching its own operating and capital needs over the next five years. With these facilities carrying more of their own weight, current and projected income levels from the agency's other facilities, with some expected adjustments, would be capable of supporting the balance of this ambitious and much needed capital program."

The capital program anticipates commitments totaling approximately $5.8 billion from 1987 through 1991, of which approximately $4 billion actually would be expended during this period. Additional spending beyond the five-year planning period would be needed to compete the Kennedy and Newark Airport initiatives.

The $5.8 billion figure includes $2.4 billion for aviation facilities, $1.5 billion on the interstate transportation network, approximately $500 million for port commerce projects, and about $650 million in other regional development projects. Approximately $400 million is allocated for other anticipated capital initiatives and rehabilitation needs on an agencywide basis for the five-year period.

The remaining $350 million includes the balance of the regional development projects agreed to by the two Governors in June 1983, the balance of the funds committed for the Port Authority's bi-state bus programs, and a provision for emergency repairs to Port Authority facilities.

The Port Authority operates six bridges and tunnels connecting New York and New Jersey; the PATH interstate rail rapid transit system; two Manhattan bus terminals; the three major regional airports, a general aviation facility at Teterboro and two heliports; port commerce facilities at Port Newark and Elizabeth in New Jersey, and marine terminals at Howland Hook on Staten Island and two sites in Brooklyn; and the World Trade Center.

Facilities under development include the Teleport on Staten Island; the Newark Legal and Communications Center; and industrial parks in the Bronx, Yonkers, Elizabeth and Newark. Other announced projects include a resource-recovery plant serving Essex County in Newark and waterfront development projects in Hoboken and Queens.

Port Authority Executive Director Stephen Berger explained: "The proposed investments are required because of the growing demand on our aviation and

vehicular and transit services, and the imperative of maintaining safe and efficient operations on many aging transportation facilities. We have an obligation to support the region's improved economic performance through our traditional transportation functions and our job-creating investments in distressed communities in both states. This is a strategic agenda for an economically integrated region."

Highlights of the Port Authority Capital program by basic business area follow.

Interstate Transportation Network

The Port Authority has recommended a regional strategy of improving and expanding trans-Hudson public transit services as the only practical solution to worsening vehicular congestion and transit system crowding as economic growth has spurred rush-hour demand. Working in cooperation with other transportation agencies in both states, the Port Authority plans to undertake major capital investments to accomplish this goal.

Specifically, the program provides funds necessary for the completion of the comprehensive PATH transit system rehabilitation and capacity expansion program initiated in 1983. This effort, already well underway, includes replacement or renewal of the entire PATH car fleet, longer trains on the Newark-to-World Trade Center and Journal Square-to-33rd Street lines, and modernization of key components and stations in the 79-year-old interstate rail system. An estimated 760 million is allocated for these purposes in the five-year program, in addition to the $165 million expended since June 1983.

Even with these extensive improvements in PATH's equipment and service, the expected continuation of 3 percent yearly growth in trans-Hudson commutation points toward a shortfall of transit capacity in the lower Manhattan market by the end of the decade. Anticipated waterfront development in Hudson County also will increase peak-period demand for PATH service.

To meet this challenge, the Port Authority has developed with New Jersey transportation agencies an integrated plan to add substantial and flexible transit capacity that can meet forecast demand in this market through the early years of the next century. The plan includes a new passenger ferry service connecting Hoboken and lower Manhattan; further investment in PATH's Newark-World Trade Center line to accommodate 9-car and eventually 10-car trains in peak periods; and implementation by New Jersey Transit of the "Reverse-Kearny-Connection" project – which will enable some NJT commuter trains now terminating at Newark to travel on to the commuter rail hub at Hoboken.

The ferry plan calls for a fleet of modern vessels capable of carrying 4,500 passengers per hour during the peak period between the existing ferry terminal in Hoboken and a new landing site and terminal to be developed at Battery Park City in Lower Manhattan. The capital program allocates approximately $150 million for this initiative. The potential for private-sector involvement in the ferry operation will be evaluated as development of the system proceeds.

The PATH expanded service plan builds on the existing plan to extend peak-period trains on the Newark-

World Trade Center line from 7 to 8 cars in 1988. The five-year program provides $70 million to extend station platforms to accommodate trains up to 10 cars in length and to purchase sufficient additional cars to run 9-car trains on this line within the five-year planning period, if demand warrants.

Meeting peak-period demand in the midtown trans-Hudson market poses more complex problems because of the larger number of facilities and services in this sector. Present concerns focus on the Lincoln Tunnel Exclusive Bus Lane system, which carries almost 65,000 commuters every morning – more than any other component of the interstate network. The Port Authority capital program provides approximately $25 million to help finance development in New Jersey of a Hudson Busway, a second exclusive bus approach to the Lincoln Tunnel.

The Port Authority is also engaged in joint study with agencies in both states of additional projects and service improvements for the midtown Manhattan market. In furtherance of this objective, the Port Authority capital plan includes approximately $25 million for traffic distribution improvements in Manhattan's Central Business District to help alleviate commuter congestion problems.

The capital program also provides $445 million in capital investment for the agency's tunnels and bridges, the Midtown Bus Terminal, and related facilities. This spending is aimed at maintaining the structural integrity of these facilities and improving their operating efficiency. For the five-year period, the plan anticipates capital commitments of $115 million at the Holland Tunnel,

$140 million at the Lincoln Tunnel, $55 million at the George Washington Bridge, $55 million at the Port Authority Bus Terminal, and $65 million on the Staten Island Bridges System.

Annual traffic growth on the Port Authority's three bridges linking Staten Island with New Jersey is now outpacing growth on the trans-Hudson crossings, and the Port Authority in 1985 announced plans to assess future needs on this system, which connects two of the region's most rapidly growing areas. The plan provides for up to $20 million of the capital program allocation for the Staten Island Bridges to be committed for start-up costs associated with a possible capacity expansion, subject to further analysis and consultation with transportation agencies in both states.

Aviation

The aviation capital program reflects the need to improve passenger circulation systems and other services at the region's three major airports to improve upon present levels of service and to accommodate projected growth in passenger demand to at least the year 2000. The plan estimates the commitment of $2.4 billion at these facilities over the next five years, with additional spending needed to complete these improvements in the 1990's.

JFK 2000 is an integrated project plan that will reconfigure the airport's central terminal area, addressing the circulation and service problems now evident at the airport, and enabling JFK to accommodate demand expected to increase to 40-45 million passengers per year by the

end of the century. In 1986, JFK handled 27.2 million passengers.

The project includes expansion of the International Arrivals Building and Federal Inspection (Customs) Hall, an automated baggage-handling system, a "people mover" rail system linking terminals to a new central transportation hub, a reconfigured roadway system, a new control tower for the Federal Aviation Agency, and other improvements. The Port Authority anticipates a commitment by 1991 of $900 million for this project. Total project cost is now estimated at $2.7 billion.

Passenger demand at Newark International Airport is expected to grow on the same scale as at JFK, and the NIA 2000 plan provides for circulation and landside access improvements, including new roadways, structural parking facilities and a "people-mover system" for improved on-airport circulation. The airport's widely dispersed market will be accommodated by development of satellite "park and fly" terminals, and a future connection of the "people-mover system" to possible new transit service linking Newark and Elizabeth. Approximately $650 million is expected to be committed for NIA 2000 by 1991. Total project cost now is estimated to be $1.35 billion.

The aviation capital plan also provides $200 million for projects at LaGuardia Airport that are designed to accommodate expected increases in passenger demand. Construction of a new passenger terminal and highway access improvements at the east end of the airport will create two separate terminal areas, one at the existing Central Terminal complex and another at the airport's

east end, with each capable of handling 15 million passengers yearly.

In addition to these major capital improvement projects, the plan allocates funds for a variety of improvements to Port Authority aviation facilities. At Kennedy, $330 million is earmarked for improvements aimed at easing congestion on roadway approaches and improving on-airport cargo facilities. An estimated $210 million will be used to complete Terminal C at Newark Airport and construct new maintenance facilities. Modernization of passenger and parking facilities and improvements to airside facilities at LaGuardia will cost an estimated $120 million.

Port Commerce

The agency has earmarked $250 million in the capital plan for improvements at Port Newark and Elizabeth, which include establishment at Port Newark of a gypsum processing plant, a second juice processing facility, and the building of cargo distribution buildings at Elizabeth to accommodate added cargo carried by larger containerships. The agency has allotted $110 million, of which $20 million has already been spent, to help finance renovation of the Howland Hook Marine Terminal on Staten Island.

The Port Authority anticipates an initial capital outlay of about $60 million for essential channel deepening in Newark Bay, the Kill van Kull and Arthur Kill, which will help finance dredging of channels and berths serving Port Newark/Elizabeth and Howland Hook on Staten Island from 35-foot to 40-foot depths. The agency undertook this commitment in a 1986 agreement with U.S.

Army Corps of Engineers, anticipating the passage of federal legislation that requires local cost sharing for channel dredging projects.

The capital plan includes $110 million for additional port projects, including continuing work at the Fishport under development in Brooklyn; support of the Oak Point Rail Link construction in the Bronx, which is designed to improve rail freight connections between upstate and downstate New York; a facility in Jersey City and Bayonne for preparation and transshipment of imported cars; and the agency's contribution to the planned US Navy Homeport on Staten Island.

World Trade

The Port Authority's capital spending plans in the area of world trade focus on efforts to improve regional telecommunications capacity and projects to support economic development in Newark. The agency has allotted $110 million between 1987 and 1991 for these efforts.

At the Teleport, the satellite communications center and office park on Staten Island, two buildings have been completed and antenna dishes for transmitting data via satellite are already operating in the facility's enclosed earth station field. A fiber-optic cable network connecting Teleport to points throughout the region has been completed.

With the City of Newark and the Newark Economic Development Corporation, work has begun on the Newark Legal and Communications Center, a facility designed for law firms with access to shared computer data banks and special legal services.

Rehabilitation projects within the World Trade Center, including fire safety projects, are also planned.

Economic Development

The agency's capital spending plans in the area of economic development target investment and the jobs it produces to inner city areas that have not fully participated in the region's overall economic recovery.

Construction continues at the Bathgate Industrial Park in The Bronx, with completion of all 12 planned blocks scheduled for 1988.

The Port Authority Industrial Park at Elizabeth has attracted its first tenants, and paving and utility work is underway on a major portion of the 125-acre site.

A new industrial park at Yonkers permits the Port Authority to emphasize economic development directly related to maintenance of its transportation system by using part of the site for manufacturing and assembling the newest PATH rail transit cars.

The agency will also establish an industrial park in the South Ward of Newark. About $75 million will be spent at the industrial parks beyond the approximately $35 million committed to them prior to 1986.

A resource recovery plant in Newark to serve Essex County will be constructed and operated by a private firm with Port Authority financing. The facility, toward which about $300 million is earmarked in the capital plan, will convert solid waste into thermal and electrical energy and sell the electricity to local utilities.

The agency continues to move forward with planning for major waterfront development projects in Hoboken and at Hunters Point, Queens.

At Hoboken, a development plan has been prepared and discussions continue with the City of Hoboken on the project timetable and operating issues.

Planning is also underway at Hunters Point, with preparation of master and alternate master plans in progress.

A total of $175 million has been allocated for waterfront development in the five-year plan, for a total in economic development projects of $550 million.

Port Authority of New York and New Jersey
Capital Program Summary
1987-1991
(in millions)

Interstate Transportation Network		
PATH Improvement Program[1]	$760	
Hudson River Tunnels, Bridges & PABT System Improvements	380	
PATH Station Improvements and Additional Cars (Newark Service)	70	
Hoboken/Battery Park City Ferry Service	150	
Staten Island Bridge Improvements[2]	65	
Holland/Lincoln Tunnel Busway	25	
Manhattan CBD Distribution Improvements	25	
		$1,475

[1] Includes expansion to 8-car trains, Newark Service, and 7-car trains, JSTC/33rd St. Service.

[2] Includes up to $20 million for preliminary stages of possible SIB Expansion.

Aviation		
JFK 2000[3]	900	
Other JFK	330	
Newark 2000[4]	650	
Other Newark	210	
LaGuardia	320	
		2,410
Economic Development		
Waterfront Development[5]	175	
Resource Recovery	300	
Industrial Parks	75	
		550
		110
World Trade		
Port		
Newark & Elizabeth	250	
Howland Hook	90	
Dredging	60	
Other Projects	110	
		510
Allocation for Regional Development Projects		150
Allowance for Projects in Development		225
TOTAL		5,430
Balance – Bus Program		50
Balance – Bank for Regional Development		235
Provision for Emergency Repairs		70
TOTAL CAPITAL PLAN		$5,785

[3] Total Project Cost: $2.7 Billion

[4] Total Project Cost: $1.35 Billion

[5] Total Project Cost: $250 Million

EXHIBIT 7

NEWS THE PORT AUTHORITY OF NY & NJ

39-87 FOR IMMEDIATE RELEASE
March 12, 1987

John F. Kennedy International, Newark International and LaGuardia Airports served nearly 79 million air travelers in 1986. That figure is expected to increase to more than 110 million by the late 1990's. The three airports comprise the busiest and most heavily used metropolitan airport complex in the world – and will undergo the largest redevelopment program in aviation history.

Kennedy and LaGuardia Airports are currently handling double the number of passengers they were designed to handle. Newark, although virtually rebuilt in the 1970's has experienced explosive growth over the last five years and is currently the seventh busiest airport in the world in terms of passengers served. On-airport circulation and off-airport ground connections are inadequate at all three facilities. Meanwhile, competing air gateways are emerging as the airline industry changes and multi-billion dollar investments in other regions threaten this area's pre-eminence as an international air hub for the movement of both people and cargo.

That dominance is at the heart of a prodigious economic impact on this region: The aviation industry in the New York/New Jersey metropolitan area accounts for nearly 300,000 jobs, $6.2 billion in wages and salaries, $19 billion in overall economic activity, $600 million in regional taxes and 3.5 percent of the gross regional product.

"This region's air transportation services," said Port Authority Chairman Philip D. Kaltenbacher, "are critical to maintaining our role as a national and international center for business and finance. Even if they were not, the 74 percent increase in nationwide annual air travelers projected by the Federal Aviation Administration to take place by 1998 would constrain us to undertake these measures.

"The size of this industry's impact on the regional economy underscores our need to take whatever steps are necessary to facilitate the swift and convenient movement of people and the rapid, efficient handling of air cargo through our airports.

"We are now embarking on an exciting and innovative capital improvement program designed to do just that."

NEWARK INTERNATIONAL AIRPORT

Newark International Airport served 29.4 million air travelers in 1986, tripling its passenger volume in the last six years. To accommodate this trend and the projected growth to 40-45 million passengers annually at Newark by the late 1990's, the Port Authority has earmarked more than $1 billion to meet the airport's growth needs. The main elements of this program include: major restructuring of the airport's roadway system; an on-airport "people mover" system connecting Terminals A, B and C and the existing long term parking lots, and having the potential to connect with an off-airport transit system; the doubling of pick-up and drop-off capacity of roadways

serving Terminals A, B and C; and a structural parking facility in the central terminal area.

Roadway improvements will incorporate modifications to the roadways serving the entire central terminal area (CTA) to provide optimum traffic flow on-airport and greatly improve the connection between on- and off-airport roadway systems. Work will be done in a phased manner to ensure continued operation of the roadway network throughout the construction period with minimal interference of traffic flow. The roadway modification program is anticipated to begin by 1988. The configuration and capacity of structural parking facilities will be designed to complement the other elements of the redevelopment program.

In addition, a principal project currently under way and in which the Port Authority will continue to be heavily involved is the completion of Terminal C and the financing of construction of the C1 and C2 concourses and the apron aircraft fueling system. The Port Authority's role in the terminal's construction includes work on adjacent taxiways and courtyards at both ends of Terminal C. The C1 and C2 concourses will provide 41 aircraft gates for Terminal C. This new terminal, being built at an estimated cost of $175 million to $200 million, is expected to be completed by the end of 1987.

As an interim improvement measure, the provision of an additional lane to the airport's existing express road will facilitate vehicular access to and egress from Terminals A, B and C. Modifications are also planned to extend public access to the new terminal's parking level frontage.

Current efforts to reduce roadway congestion include the development of a holding area for taxis and limousines to reduce congestion in front of the terminals. The completion of Parking Lot F, already under construction, will provide 3,000 more long-term parking spaces, bringing the airport's total parking capacity to 23,000. The addition of eight new and two reversible exit lanes and the recent initiation of the pre-cashiering program allowing for pre-payment in the terminals for those parked for less than 24 hours will help reduce queuing at the CTA parking lot tolls plaza.

In the aeronautical areas, new taxiway additions and modifications will help reduce aircraft runway occupancy times and provide greater flexibility for aircraft ground movement. Other improvements include centerline lighting for Runway 11/29, an instrument landing system for Runway 11 and a new aircraft noise monitoring system. There is also provision for taxiway access and installation of related paving and utilities to the airport's United Parcel Service site and other cargo and maintenance sites at the south end of the airport.

A new maintenance facility will be constructed, providing 57,800 square feet of space to accommodate the airport's maintenance functions and a 38,800 square foot garage to house the airport's snow removal vehicles.

JOHN F. KENNEDY INTERNATIONAL AIRPORT

John F. Kennedy International Airport was conceived, designed and constructed more than a generation ago to serve what was then an extremely optimistic forecast of 15 million air passengers a year. Although the

airport's airline terminals have been expanded and airfield and roadway improvements have been made since that time, the airport is recognizably the same as it was when the International Arrivals and Wing Buildings and nine individual airline terminals, comprising the central terminal area, were completed in the early 1960's.

In 1986, Kennedy International handled more than 27.2 million air passengers, a volume that is expected to grow to 40 to 45 million by 1995-2000. More than one-third of all international air passengers arriving in the United States enter through Kennedy, making it the nation's leading air gateway.

To meet the projected demands of the next decade and into the 21st century and to provide superior levels of service for all airport patrons, both domestic and international, The Port Authority of New York and New Jersey is planning an extensive redevelopment and reconstruction program for Kennedy Airport over a ten year period that will cost approximately $3 billion. More than $1 billion of this amount is included in the present five-year capital plan. The components of this major capital program include airport access improvements, terminal expansion and the development of a new central passenger services complex.

Transportation Center

A new Transportation Center will be at the heart of the plan to redevelop the central terminal area. Its main purpose will be to handle all passengers using public transportation to or from the airport and travelers making connecting flights. Buses and limousines will no

longer make stops at each airline terminal, but will make a single stop to drop off or pick up passengers at the new Transportation Center's Arrivals and Departures level.

Other improvements will be an expanded Federal Inspection Services facility, capable of processing twice as many passengers per hour as currently handled; an automated baggage sorting system, tying each of JFK's unit terminals into a single baggage transfer system; automobile parking contained within the Transportation Center; new food and retail services near a new Meeter/Greeter Hall; and a new FAA control tower as part of the complex. Center plans incorporate provision for a chapel area to serve the spiritual needs of airport travelers and employees.

Passenger Distribution System

At the Transportation Center, a new fully automated Passenger Distribution System (PDS), or "people mover," will shuttle passengers to each airline terminal at two-minute intervals, replacing the existing on-airport bus and taxi operations, as well as providing service to those who walk between terminals. The PDS will help reduce traffic congestion and also facilitate the movement of travelers and luggage between connecting flights.

Baggage Handling System

A major element of the proposed improved passenger services at JFK is a new and efficient inter-terminal baggage service – a fully automated handling system that is expected to sharply reduce baggage transfer time.

The primary components of this system will include a central sorting facility located in the Transportation Center; a series of high speed conveyers and/or destination-coded vehicles that will replace the existing "tug and cart" method; a state-of-the-art, laser-read tag system; and a coordinated system of baggage collection and distribution between each airline terminal, the Transportation Center and the refurbished International Arrivals Building.

Redeveloped Roadway Network

An entirely redesigned roadway network, constructed in phases to minimize traffic problems, will reduce the most obvious form of airport congestion. This redeveloped roadway network will include: 1) completion of the new JFK Expressway, providing direct access to the passenger terminals from the Belt Parkway at 150th Street; 2) more direct roadway connections to the passenger terminals, replacing the existing loop road; 3) direct roadways to the Transportation Center from the Van Wyck and JFK Expressways, designed to improve access for public transportation vehicles; 4) modifications to roadways in front of each passenger terminal to reduce traffic conflicts; and 5) the completion of a new taxi holding area to provide a more efficient taxi dispatch system.

These roadway improvements will result in shorter travel distances and reduce traffic congestion and travel times for all movements within the central terminal area.

In addition to the roadway work the Port Authority is undertaking as part of the overall capital program,

work is also being performed by New York State on the new Nassau Expressway, at an estimated cost in excess of $100 million. The State's project, begun in 1983, will link the Belt Parkway at Cross Bay Boulevard with the Atlantic Beach Bridge in Nassau County.

Southwest Area Connector

Although it is not part of the improvements currently programmed, the Port Authority will examine the feasibility of constructing a passenger distribution system linking the New York City Transit Authority's JFK Express station at Howard Beach station with the central terminal area. Right-of-way provisions may also be made to allow for future consideration of a single track subway extension from the Howard Beach station to the central terminal area.

LAGUARDIA AIRPORT

Due to its proximity to Manhattan and wide choice of domestic flights, LaGuardia Airport is popular, especially with business travelers. In 1986, LaGuardia's compact site was crowded with more than 22.2 million passengers. Current projections are for 28 million passengers by 1995-2000, an almost 30 percent increase in passenger traffic. To handle this projected growth, the Port Authority will increase the capacity and ease of using the airport through an ambitious modernization and development program.

The current highly compartmentalized Central Terminal Building (CTB) layout will be opened up to create a

more homogeneous terminal that will provide more space for passenger circulation and amenities. Work has begun to expand interior space and make it more open for freer movement on both the first floor arrivals level and the second floor departures level of the CTB.

On the arrivals level, the terminal's streetside window wall will be moved out by more than 20 feet along the entire length of the building, to provide additional space for patron circulation, ground transportation services and baggage claim areas. On the departures level, work will include widening the roadways by at least an additional land to reduce congestion in front of the CTB. Construction on both these projects is scheduled to start in 1988.

Another important component of the plans for the central terminal area is provision of a direct entrance to the parking garage from the 94th street entrance, which would eliminate the need for circling the garage in order to enter, and thereby reduce traffic in front of the CTB. Construction for this segment of the plan will start in 1988.

The new east end terminal, to be used by one or more airlines, would be built adjoining the Eastern Airlines Shuttle Terminal. The new terminal would include approximately 250,000 square feet of space on two levels and incorporate all patron services facilities. Its construction, scheduled to start in 1989, should help to balance passenger traffic between the central terminal area and the east end area.

Construction of a new East End Passenger Terminal will be complemented with a roadway program that will

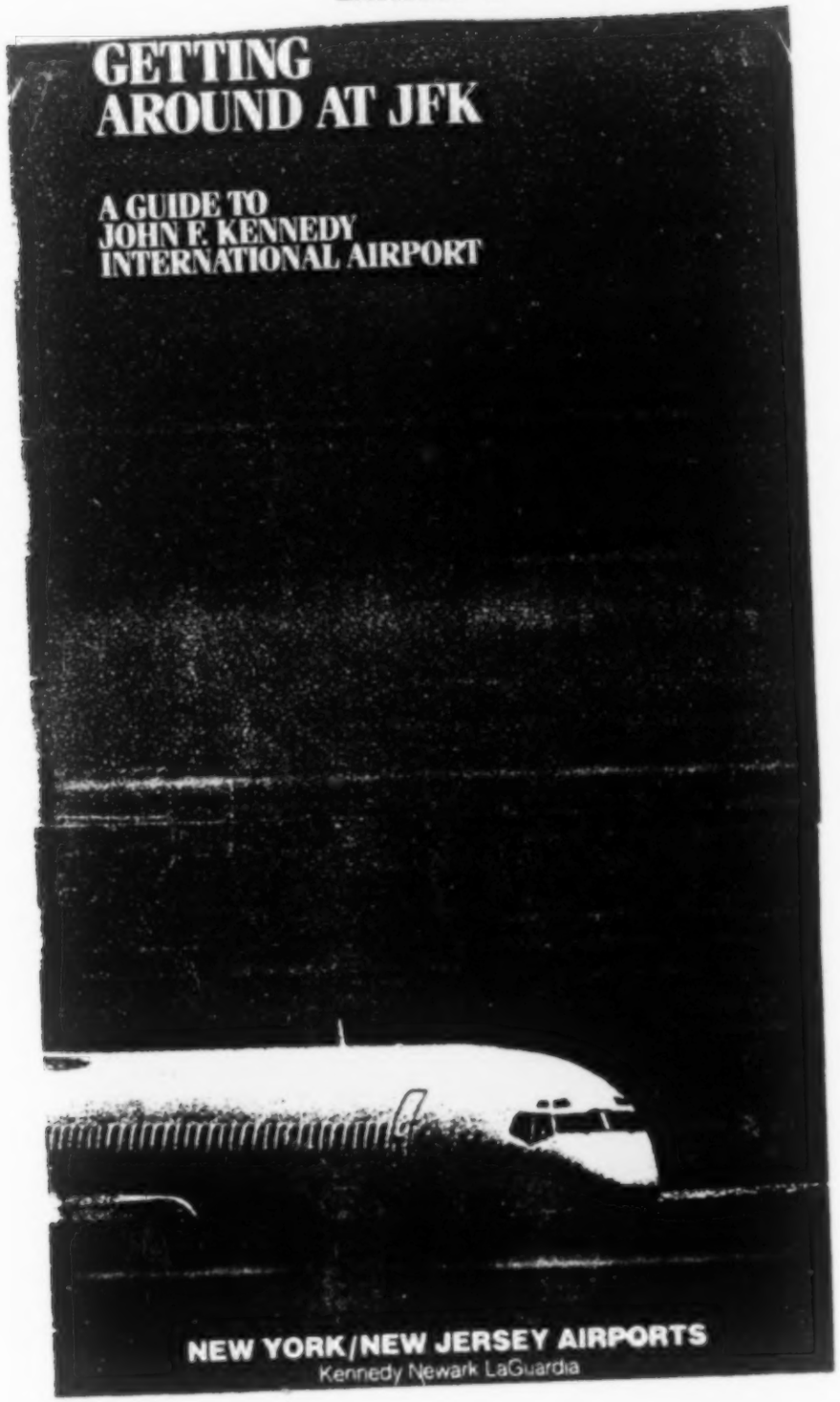
reconfigure and expand on-airport roads while providing new access to LaGuardia's east end area with construction of new off-airport roadways.

Starting in 1987, the airport's east-end roadways will be realigned and expanded to provide more efficient service to travelers. To improve airport access to the east end, off-airport road work should commence in 1990. Construction of ramp connections to the 102nd Street Bridge, which will serve as an exit and entrance to the airport, and a new fly-over roadway to provide access from the eastbound Grand Central Parkway to the east end terminals (Delta Airlines, Eastern Airlines Shuttle, and the planned East End terminal), will allow the separation of central terminal area and east end vehicle traffic.

Additional capital work at LaGuardia involves miscellaneous improvements to the aeronautical areas; more aircraft parking space; and construction of a safety overrun area at the end of Runway 13-31, all of which will serve to improve operations at the airport.

Also scheduled for construction is an underground hydrant fueling system, which would improve safety and obviate the need for fuel trucks in the ramp areas, thereby reducing overall ramp congestion.

EXHIBIT 8



WELCOME!

Welcome to John F. Kennedy International Airport. We hope you enjoy your stay.

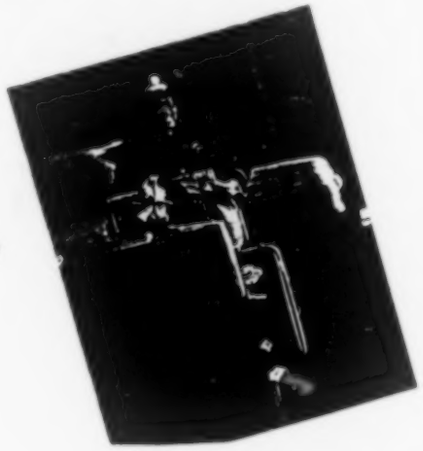
As one of the nation's busiest airports, handling some 30 million passengers each year, we're proud to be the world's gateway to America. In order to ensure that JFK remains America's premier gateway in the 21st century, we have embarked on a program of redevelopment and reconstruction without precedent in the history of the airport. The groundwork is now being laid for a new JFK that will be among the world's most modern international airports, with facilities and services that will dramatically improve the quality of air travel through our gateway.

This Visitor's Guide has been prepared with your comfort and convenience in mind—to help you find your way around and to acquaint you with the many services available. In addition to the information offered in the following pages, please refer to the insert in the back pocket of this Guide. It contains up-to-date information about the airport and its services, including complete parking rates and ground transportation schedules. Whether you're landing, taking off or just stopping by on your way to catch another flight, we're happy to have you with us and hope you'll come this way again soon.

Sincerely,

Robert J. Aaronson

Director of Aviation
The Port Authority
of New York and New Jersey



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NOW THAT YOU'VE LANDED

INFORMATION FOR ARRIVING PASSENGERS ON INTERNATIONAL FLIGHTS

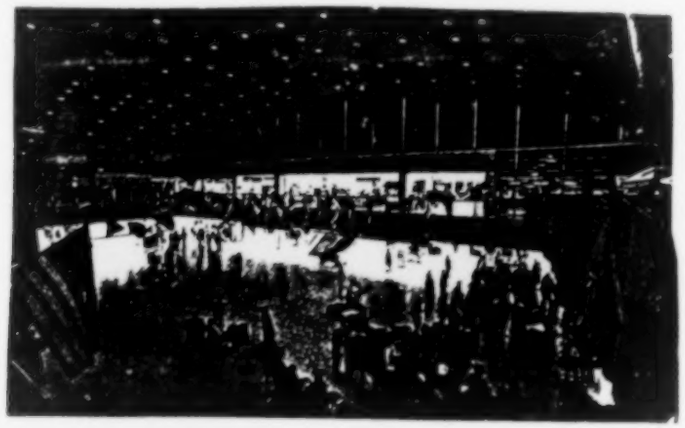
International flights requiring federal clearance arrive at the International Arrivals Building or at American Airlines, British Airways, Pan American Airways or TransWorld Airlines terminals.

U.S. Immigration and Customs forms: While in flight, your flight crew distributes U.S. Immigration and Customs forms to each passenger. To avoid delays, please fill out these forms *before you land.* And be sure to have your passport in hand when you leave the plane.

Non-U.S. residents: If you are not a U.S. resident, a review of your passport and other documents is required by the U.S. Public Health Service and the Immigration and Naturalization Service.

U.S. Customs: All international passengers—both U.S. residents and nonresidents—then proceed to the baggage claim area and to U.S. Customs. At JFK, U.S. Customs has devised special procedures to help speed you through the process.

- Those having nothing to declare to U.S. Customs are usually permitted to pass through without delay.
- Those with meats, fruits, plants or large amounts of currency are among those who are required to undergo baggage inspection.



Multilingual services: During peak periods, personnel with multilingual capabilities are available to assist arriving international passengers. Additional staff with bilingual capabilities are available at the Information Desk, located in the first floor lobby of the International Arrivals Building.

INFORMATION FOR ARRIVING PASSENGERS ON DOMESTIC FLIGHTS

Passengers on domestic flights exit the plane and proceed directly through one of our domestic terminals—American, Eastern, British Airways, Pan Am, Delta/Northwest, TransWorld Airlines Terminal "B" or United—and then to the baggage claim area.

INFORMATION FOR PASSENGERS CATCHING ANOTHER FLIGHT

FREE BAGGAGE TRANSFER SERVICE

If you're connecting to another flight at JFK, we urge you to take advantage of the free baggage transfer services offered by most airlines.

When you arrange in advance to have your baggage transferred, you're able to move about JFK more freely, quickly and conveniently. And you arrive at your destination feeling fresh rather than frazzled.

How to arrange it

To arrange for free baggage transfer at JFK, just follow these steps:

1. When purchasing your tickets, tell your travel agent or airline representative that you'd like your baggage transferred to your connecting flight at JFK. Be sure to confirm that you have been ticketed as an 'interline connecting passenger.'
2. Before departing, remind airline personnel ticketing your luggage that you want your baggage transferred to your connecting flight at JFK. An appropriate tag will then be affixed to your luggage.

International flights: On arrival at JFK, passengers on international flights should claim their baggage and proceed through U.S. Customs and Immigration. Immediately after clearance, luggage should be checked with the airline representative at the baggage collection point.

Domestic flights: Passengers arriving on domestic flights should arrange, through their travel agents, to have their baggage 'interlined.' Their luggage will then be transferred automatically, and they may board the free yellow and white buses to reach their connecting flights "luggage free."

WHEN YOU'RE READY TO TAKE OFF

INFORMATION FOR DEPARTING PASSENGERS

Please leave yourself enough time.
To ensure ample time for parking, security screening and unanticipated delays, we urge you to arrive at your terminal at least one hour prior to the scheduled departure time of your flight.

When you arrive at JFK: Drop off your luggage at your airline's curbside check-in, provided one is available, or at your airline's ticketing counter. Then proceed to the gate from which your flight is scheduled to depart.

For everyone's security: To help ensure everyone's security, the Federal Aviation Administration mandates that all passengers must undergo security screening. This simple process requires only that you walk through a security device before boarding your flight and that you pass any hand-held baggage through an X-ray machine.

PASSENGER SERVICES AT JFK

You may never require the services listed below. But if you should, you'll be glad to know they're available.

INFORMATION SERVICES AND ASSISTANCE

Police: For general assistance, call *(718) 656-4668*. In an emergency, *(718) 656-4333*.

Information Counters: A centrally-located information counter—staffed by bilingual personnel—is on the first floor of the main lobby of the International Arrivals Building, *(718) 656-7990*. In addition, you'll find information desks at most other terminals. Consult the chart on page 14 to determine whether your airline has one. For information over the phone, call *(718) 656-4520*.

Ground transportation information: JFK's consolidated ground transportation counter is located in the first floor lobby of the International Arrivals Building. There, knowledgeable staff provide accurate information, free of charge, on how to get to or from JFK.

HEALTH AND HUMAN SERVICES

Medical services: A medical clinic, open 24 hours a day, is located in Building #198, at 150th Street and South Cargo Road, *(718) 656-5344*. In an emergency, contact the Airport Police on *(718) 656-4333*.

Dental services: A dental office, open Mondays and Wednesdays from 10 a.m. to 5:30 p.m. and Thursdays from 10 a.m. to 3:30 p.m., is located in Suite 2311 on the second floor in the East Wing of the International Arrivals Building, *(718) 656-4747*.

Assistance for the disabled: To assure the disabled person maximum comfort, convenience and ease of movement through the airport, it is wise to make all necessary arrangements *in advance*—through your travel agent or airline representative. For additional information about facilities for the disabled at the International Arrivals Building, contact The Port Authority of New York and New Jersey at *(718) 656-4476*.

Nursery facilities: A nursery, located on the second floor of the International Arrivals Building, offers a changing table and lounge. Additional nursery facilities are located in the British Airways and TransWorld Airlines terminal buildings, but are restricted to use by those airlines' ticketed passengers.

Traveler's Aid: This nationwide social service agency, offering various types of assistance to the traveler, maintains an office in the International Arrivals Building. Its hours are 10 a.m. to 10 p.m., weekdays; and 3 p.m. to 10 p.m., weekends, *(718) 656-4870*.

Paging: This service can be arranged by calling the airline on which the passenger is arriving or departing.

Religious services: JFK's tri-faith chapel plaza, located near the center of the airport, offers a Roman Catholic chapel, *(718) 656-5348*, a Jewish international synagogue, *(718) 656-5044* and a Protestant chapel, *(718) 656-5693*.

PASSENGER SERVICES AT JFK

At the Catholic chapel, a mass is scheduled each day at 12:15 p.m., at 5 p.m. on Saturday and Sunday, and at 9 a.m. and 10 a.m. on Sunday. Confessions are heard before each mass. For schedules of services for the synagogue and the Protestant chapel, call the appropriate telephone number, as shown above.

The chapel plaza is accessible from the International Arrivals Building by walking through Parking Lot #2. From other terminals, please use your car or a taxi.

PASSENGER CONVENIENCES

Banks, cash machines and foreign currency exchanges: You will find these facilities in most terminal buildings.

Baggage storage: Staffed baggage storage is provided in two locations on the second floor of the International Arrivals Building, *(718) 995-2228*. Another baggage storage area is provided on the third floor of the Pan American Airlines terminal *(718) 656-8617*. In addition, several terminals provide lockers for baggage storage.

On-site lodgings: The International Hotel, located right here at JFK, may be contacted through free courtesy telephones in all terminal buildings or at *(718) 995-9000*. Other hotels and motels may be reached through courtesy telephones or airline representatives.

Hotel reservations: A hotel reservation service desk, operated by Meegan Services, Inc., is staffed 24 hours a day and is located in the International Arrivals Building, *(718) 995-9292*. Hotel reservation desks or courtesy telephones are available in all other terminals as well.

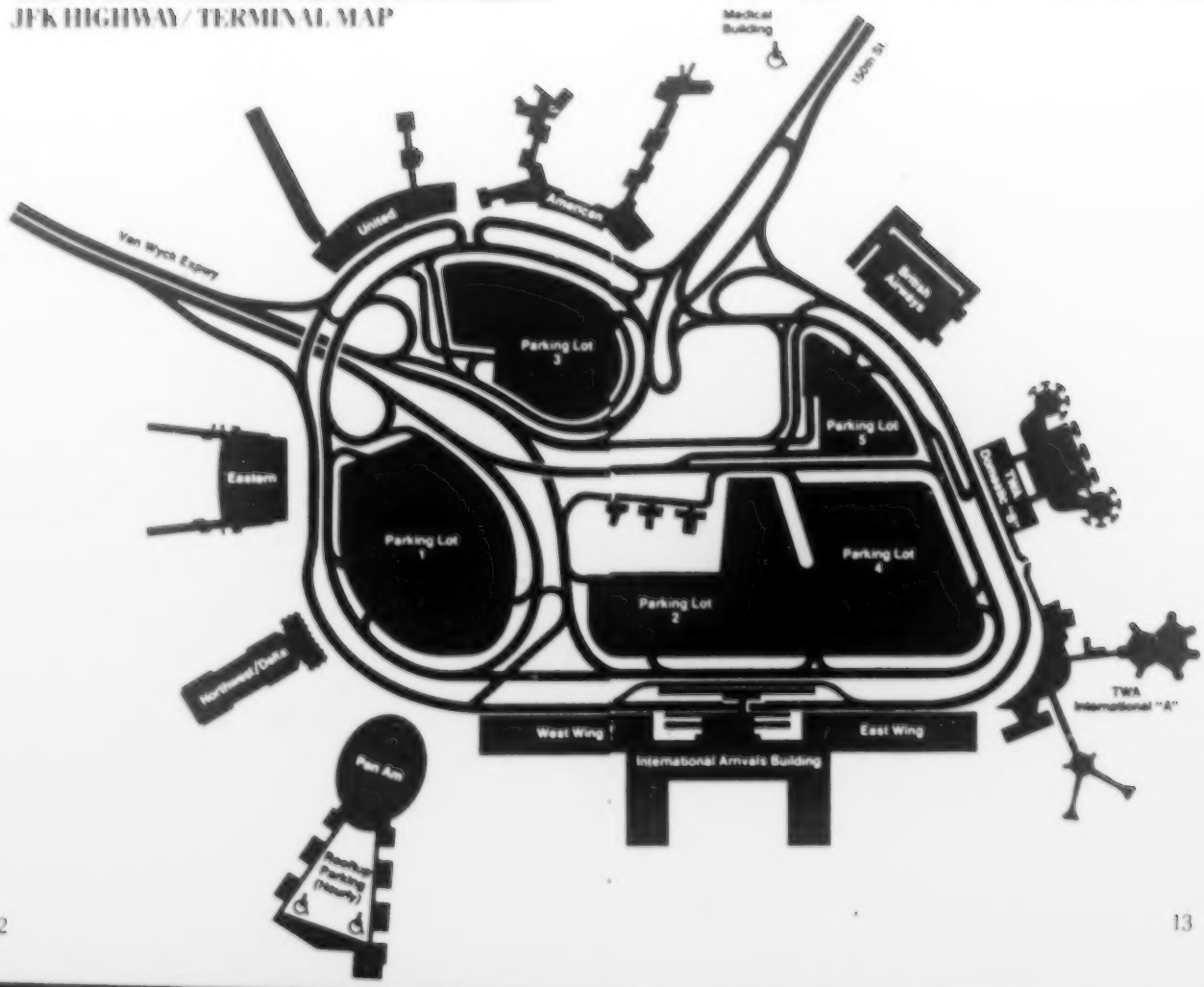
Animal shelter: An animalport, operated by the American Society for the Prevention of Cruelty to Animals (ASPCA), is available for the holding or boarding of animals of all sizes, 24 hours a day. It is located in Building #189 on North Service Court in the Air Cargo Center, *(718) 656-6042*.

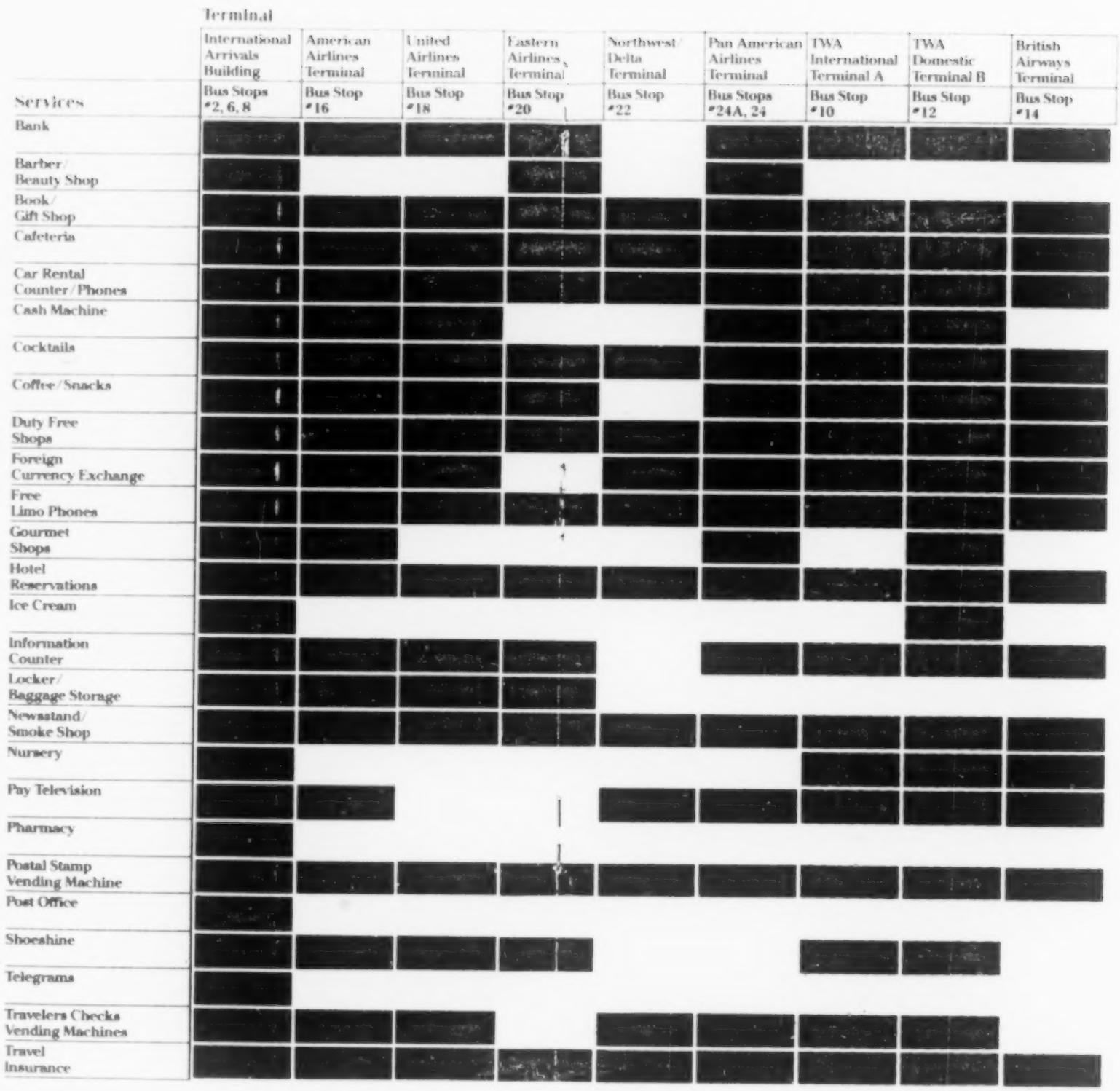
Lost and found: To recover items lost aboard flights or in airline terminals, contact your airline representative first. If these items cannot be located, contact the main Lost and Found office on *(718) 656-4120*.

GOVERNMENT SERVICES

Postal services: You will find mailboxes and stamp vending machines at various locations in all airline terminals. In addition, there is a postal substation in the East Wing of the International Arrivals Building and a post office in the Air Mail Facility, Building #250 on North Boundary Road in the cargo area, *(718) 917-1438*.

JFK HIGHWAY / TERMINAL MAP




Terminal
International Arrivals Building
American Airlines Terminal
United Airlines Terminal
Eastern Airlines Terminal
Northwest/ Delta Terminal
Pan American Airlines Terminal
TWA International Terminal A
TWA Domestic Terminal B
British Airways Terminal
Services
Bus Stops #2, 6, 8
Bus Stop #16
Bus Stop #18
Bus Stop #20
Bus Stop #22
Bus Stops #24A, 24
Bus Stop #10
Bus Stop #12
Bus Stop #14
Bank
Barber/ Beauty Shop
Book/ Gift Shop
Cafeteria
Car Rental Counter/Phones
Cash Machine
Cocktails
Coffee/Snacks
Duty Free Shops
Foreign Currency Exchange
Free Limo Phones
Gourmet Shops
Hotel Reservations
Ice Cream
Information Counter
Locker/ Baggage Storage
Newsstand/ Smoke Shop
Nursery
Pay Television
Pharmacy
Postal Stamp Vending Machine
Post Office
Shoeshine
Telegrams
Travelers Checks Vending Machines
Travel Insurance

WHERE TO PARK YOUR CAR AT JFK

Where you park depends on how long you park. There are lots designated for hourly, short-, and long-term reduced-rate parking, as described below. All parking rates include New York City Sales Tax.

For parking lot rates and information on free bus shuttle service from the reduced-rate lots, consult the 'Parking' section of the insert in the back pocket of this booklet.

Hourly parking: Lot #6, on the Pan American Airways rooftop, is intended for use by drivers who are picking up or dropping off passengers. *Note that this is the most expensive of the parking options available to you at JFK and is intended for use for two hours or less.*

Short-term parking: Lots #1, 2, 3, 4 and 5 are for travelers who intend to park their cars for periods not exceeding several days.

Long-term reduced-rate parking: Lots #8 and 9 are offered at reduced rates to travelers who plan to park their cars for periods longer than several days. *Note that these lots are the least expensive of the parking options available, but are also located farthest from the terminals.* Free 24-hour bus transportation is provided from these lots to the central terminal area.

Parking accommodations for the disabled: Facilities for the disabled vary from airline to airline. Therefore, disabled passengers who intend to park their cars at JFK are advised to contact their airlines *well in advance* of their arrival for information on parking and other services.

Reserved spaces for the disabled—available at reduced rates—are provided in Central Terminal areas lots #1, 2, 3, 4, 5 and 6. For rate information, consult the 'Parking' section of the insert in the back pocket of this booklet.

For additional information on airport services for the disabled, write The Port Authority of New York and New Jersey, Aviation Customer and Public Services Division, One World Trade Center, Room 65N, New York, N.Y. 10048, or call *(212) 466-7503*.

AIRPORT PARKING AND DRIVING TIPS

- All parking facilities are provided on a first-come, first-served basis.
- Allow sufficient time for driving and parking to ensure that you arrive at your terminal at least one hour before flight time.
- Always lock your car and take your keys with you.
- Check your lights.
- Do not leave articles—whether you consider them valuable or not—in your car.
- Take your parking ticket with you.
- On your parking ticket, be sure to write the lot and section number where you've parked your car.
- For assistance, contact the exit booth attendant.
- If you need towing or other types of automotive services, call the garage or auto club of your choice.
- If you intend to park for more than 30 days, you are required to notify parking lot management. The exit booth attendant will assist you.

PLEASE OBEY SEAT BELT LAWS. THEY'RE FOR *YOUR* PROTECTION.

Visitors flying in to JFK and driving to destinations in New York, New Jersey or Connecticut are required by law to "buckle up." Violators of state seat belt laws are subject to fines.

For your safety, seat belts should be worn by:

- all front seat occupants
- all children under 10 anywhere in the vehicle

Children under four must be secured in a child safety restraint device.

IF YOU'RE PARKING AT JFK, DIALING THESE TELEPHONE NUMBERS CAN GET YOU INFORMATION OR ASSISTANCE, FAST.

Current parking and roadway status (taped message) . . . . . *(718) 495-5400*
Parking operator . . . . . *(718) 656-5699*
Airport auto service . . . . . *(718) 917-6085*
Police . . . . . *(718) 656-4668*

MAJOR AUTO ACCESS ROUTES TO JFK

A - George Washington Bridge
B - Triborough Bridge
C - Lincoln Tunnel
D - Holland Tunnel
E - Brooklyn Battery Tunnel
F - Verrazano Narrows Bridge
G - Manhattan Bridge
H - Queens Midtown Tunnel
I - Whitestone Bridge
J - Goethals Bridge
K - Throgs Neck Bridge

Newark International Airport--immediately adjacent to the New Jersey Turnpike between exits 14 (north) and 13A (south). For the North Terminal, use exit #14. To Terminals A, B or C use exit #13A.

HOW WE TAKE THE WALKING OUT OF FLYING AT JFK

GROUND TRANSPORTATION SERVICES

For prices, schedules and a listing of the companies offering the services listed below, consult the 'Ground Transportation' section of the insert in the back pocket of this booklet.

WITHIN JFK

Free 24-hour terminal-to-terminal bus service: If you're traveling between JFK's nine terminals, board one of our climate-controlled, yellow and white airline connection buses. These operate free of charge, 24 hours a day.

Taxi service: At each terminal within JFK you'll find a taxi dispatcher on duty during peak travel periods, at designated taxi stands. The dispatcher will summon a taxi,licensed by the New York City Taxi and Limousine Commission, for trips within JFK and its vicinity.

Transportation for the disabled: Autolink, an on-demand transportation service provided by the airlines as a courtesy to disabled passengers, provides fast point-to-point connections between terminals. This service, which employs vehicles specially designed to accommodate disabled passengers and wheelchairs, must be arranged through your airline representative in advance of your arrival.

TO AND FROM JFK

The listings that follow provide general information on ground and local air transportation services available to you at JFK. For specifics, consult the 'Ground Transportation' section of the insert in the back pocket of this booklet.

At JFK, you can also obtain information by consulting personnel at the Consolidated Ground Transportation Counter, located on the first floor of the lobby of the International Arrivals Building. Knowledgeable staff will assist you, providing schedules, prices and specific drop-off points.

Express bus service: Express bus service is available between JFK and Manhattan and Brooklyn. Bus stops are located outside each terminal building.

The JFK Express: This high-speed bus and train combination links JFK with Manhattan and Brooklyn and runs about every 20 minutes. Outside your airline terminal, look for a sign reading 'Bus/Train to New York City.' At this location, you board a shuttle bus which takes you to a nearby subway station, where you board a train bound for Manhattan and Brooklyn.

Limousine service: Upon request, limousine services offer a single passenger or a group of passengers a wide array of vehicles—buses, vans, sedans, conference cars—to or from most destinations. Fares are based on a per person, hourly or flat rate. Arrange for a limousine by calling a company in advance or visit the Consolidated Ground Transportation Counter in the International Arrivals Building. At other terminals, use free limousine company courtesy phones near the baggage claim areas.

Taxi service: You will find taxis available outside each terminal. To assist you in securing one, uniformed taxi dispatchers are on duty during peak travel hours at the International Arrivals Building and at the other central terminal area buildings. If you arrive during a non-peak period and find no dispatcher on duty, request assistance from a uniformed terminal guard or uniformed police officer.

For your security: Your taxi dispatcher will provide you with a taxi information flyer with multilingual text. After you have read it and secured a taxi, write on this flyer your cab's identification number—located on the roof of the cab, between the "on" and "off" duty sign—just in case you have a problem with the service provided.

Car rental services: You will find car rental counters operated by Avis, Budget, Dollar, Hertz and National in the International Arrivals Building. At other locations, use the courtesy telephones provided. The rental car return facility for all of these companies is located at JFK's Federal Circle, easily accessible from the Van Wyck Expressway and all terminal buildings. And remember: *Buckle up for safety. It's the law.*

Helicopter service: Helicopter service is available between JFK and the 34th Street Heliport, in midtown Manhattan. Helicopter service is also available between JFK and Newark International and LaGuardia airports.

TRANSPORTATION FROM JFK TO NEWARK INTERNATIONAL AND LAGUARDIA AIRPORTS

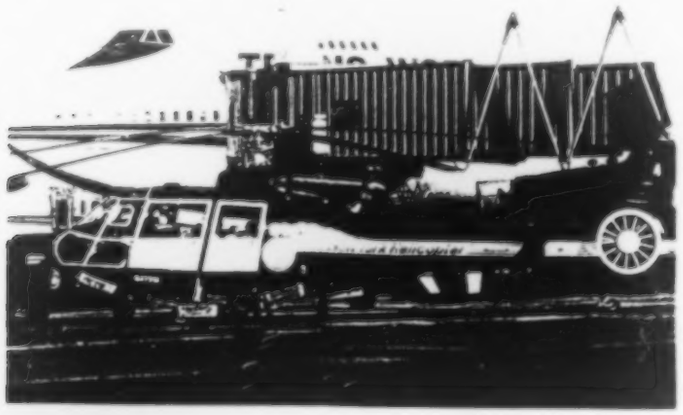
If you want to reach Newark International or LaGuardia Airport in a hurry, there are four convenient transfer services to choose from:

Express bus service: Express buses operate between JFK and Newark International and LaGuardia airports on fixed schedules.

Limousine service: Limousines are available for inter-airport connections on a daily, regularly scheduled basis.

Taxi service: *See 'Taxi service' listing on page 22*

Helicopter service: Many airlines offer free or reduced-rate inter-airport transfers via helicopter. For more information, contact your airline representative.



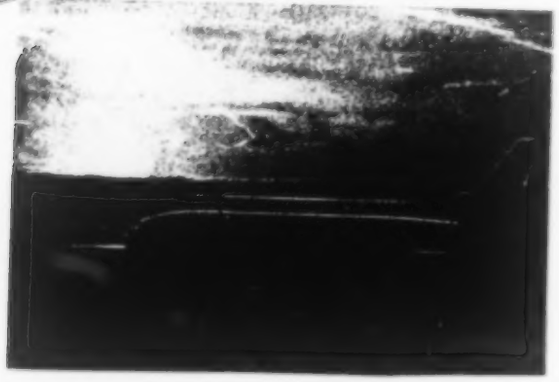
START WITH AN AREA ONE-THIRD THE SIZE OF MANHATTAN . . .

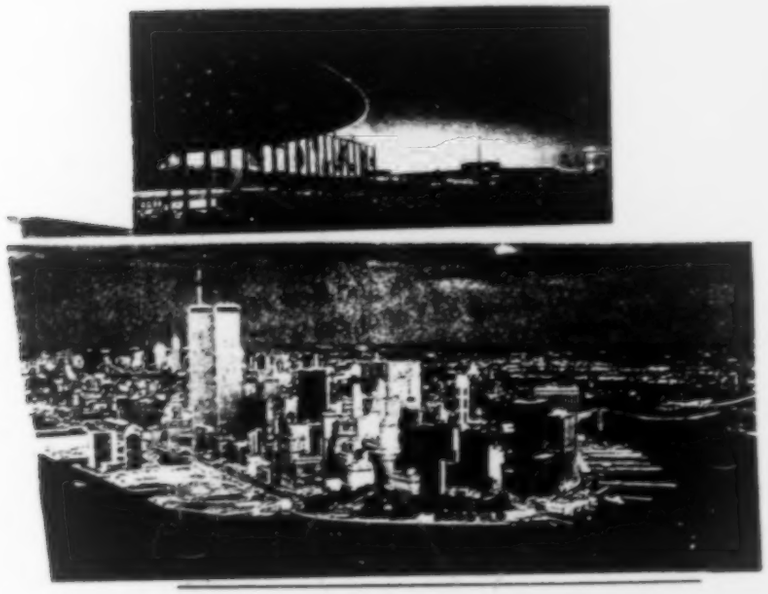
A PROFILE OF ONE OF THE WORLD'S BIGGEST, BUSIEST AIRPORTS

John F. Kennedy International Airport, located only 15 miles from midtown Manhattan, is one of the nation's busiest airports. Because of its strategic geographic location, JFK has long been considered the world's gateway to America.

Because of its size (4,930 acres) and the number of airlines it accommodates (79 in all), JFK is able to serve more than 30 million passengers a year—including one-third of all international air passengers arriving in the United States.

Aside from the large and growing number of passenger services, the wealth of shops and restaurants serving every taste and budget, the statistics of JFK's facilities are truly amazing:





- JFK occupies a total of 4,930 acres—an area equal to the size of Manhattan Island, from the Battery to Midtown.
- JFK has a total of 150 aircraft gate positions, to serve the various terminals.
- JFK's runways extend a total length of nine miles.
- JFK's taxiways cover an area of 22 miles.
- JFK has over 16,000 parking spaces.
- JFK has 31 cargo buildings.
- JFK has the world's largest animalport.
- JFK has its own Post Office.
- JFK has storage facilities for 32 million gallons of aircraft fuel.
- JFK has flights to over 150 domestic and international cities.

All passenger flights are serviced within the central terminal area, where the International Arrivals Building and eight individual terminal buildings are located.

JFK's giant physical plant, impressive as it is, really has one purpose: to serve *you*. In the future, as in the past, all of us at John F. Kennedy International Airport will be working to make our service—and our services—the best of any airport in the world.

ABOUT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

John F. Kennedy International Airport is operated by The Port Authority of New York and New Jersey.

Created in 1921, The Port Authority is a bi-state agency which undertakes port and regional improvements; provides dock facilities for the harbor shared by the states of New York and New Jersey; and, in general, promotes and operates trade and transportation projects to maintain the Port of New York/New Jersey's position as America's preeminent gateway and the world's most dynamic port.

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Published by the Aviation Customer and Public Services Division, Aviation Department, The Port Authority of New York and New Jersey

IN OUR POCKET

- How to get to, from and around JFK
- Parking lot information and rates
- Car rental information
- Airline listing and locations
- Map of terminal connection bus stops

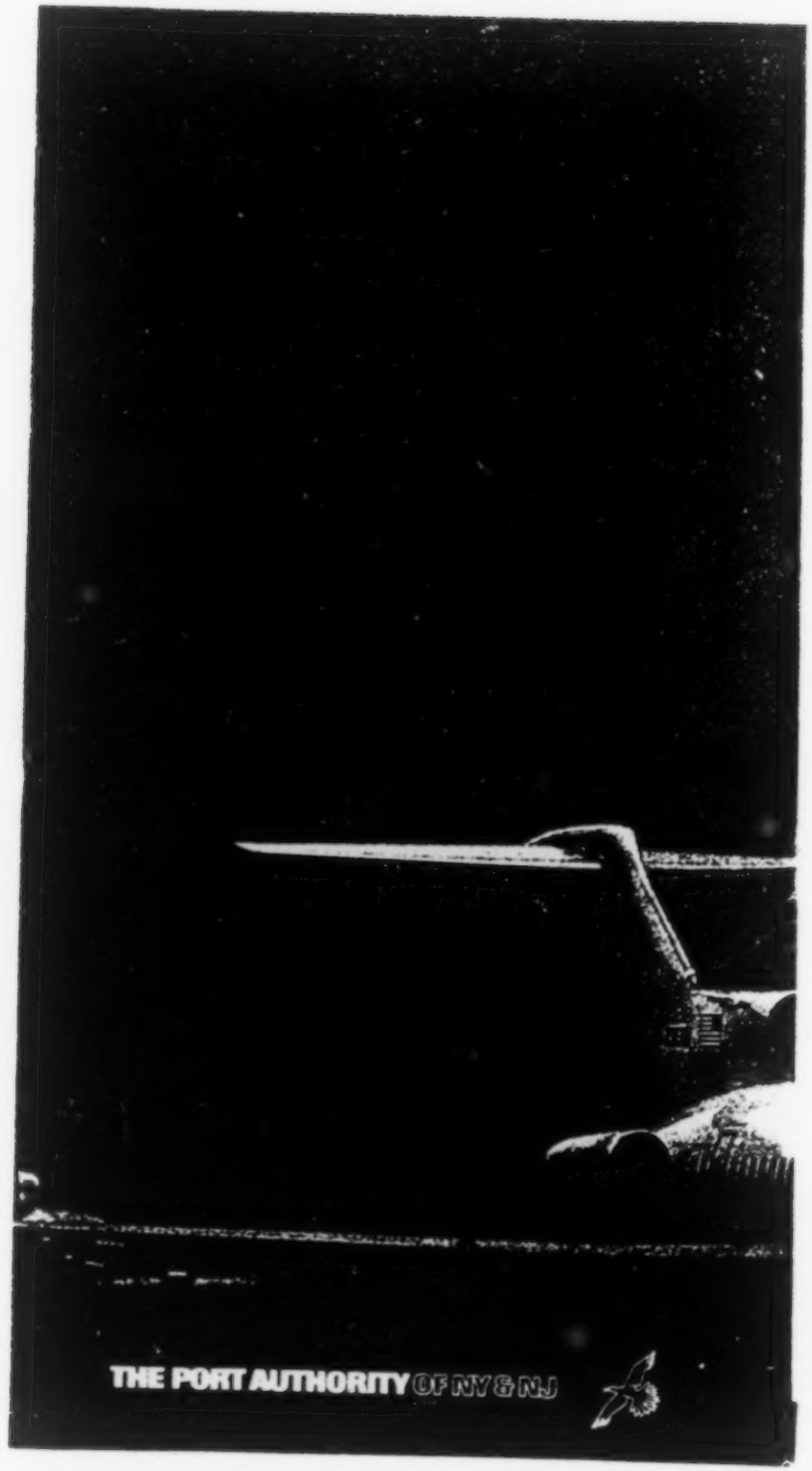
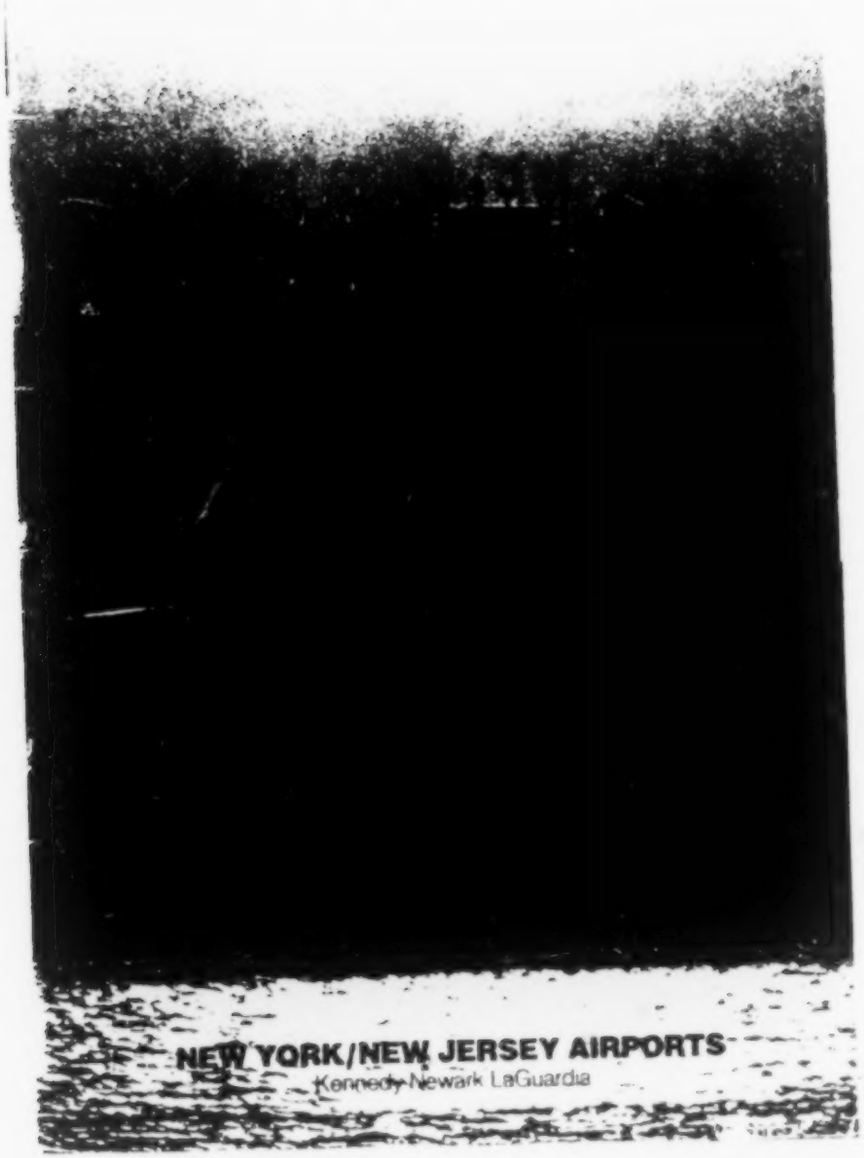


EXHIBIT 9

GETTING AROUND AT LGA

A GUIDE TO LAGUARDIA AIRPORT



WELCOME!

Welcome to LaGuardia! We hope you enjoy your stay.

We're proud that LaGuardia is one of the busiest airports in the nation and provides convenient service to the New York/New Jersey metropolitan area. LGA handled 20 million passengers in 1985 and it is projected that 30 million passengers will use it in the year 2000.

To keep pace with this growth, new roadways are planned to provide improved vehicular access to the airport. The entire Central Terminal Building is being remodeled and expanded to accommodate more concessions and spacious waiting rooms and ticketing areas. Also, studies are in progress for a new terminal which might be built on the eastern side of the airport to handle the airport's increasing number of flights.

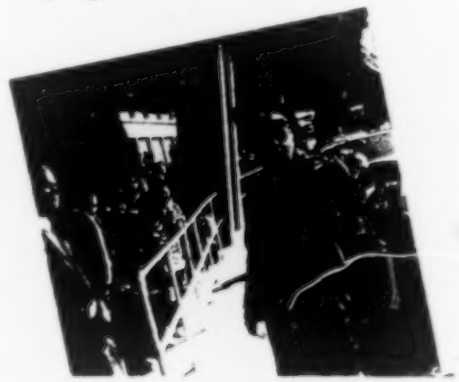
This visitor's guide has been prepared with your comfort and convenience in mind — to help you find your way around our fast-growing airport and to acquaint you with the many services available to you.

In addition to the information offered in the following pages, please refer to the insert in the back pocket of this guide. It contains up-to-date information about the airport and its services, including complete parking rates and ground transportation schedules.

Whether you're landing, taking off, or just stopping by on your way to catch another flight, we're happy to have you with us and hope you'll come this way again soon.

Sincerely,

Robert J. Aaronson
Director of Aviation
The Port Authority
of New York
and New Jersey



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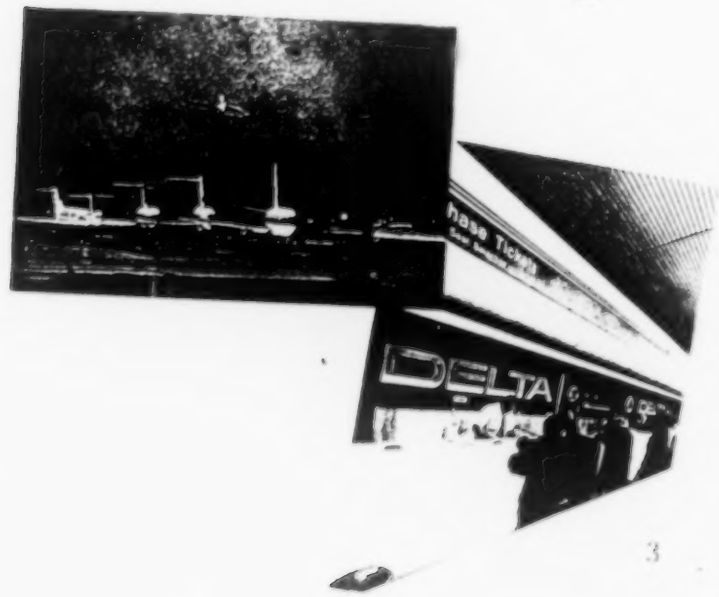

WHEN YOU'RE READY TO FLY . . .

INFORMATION FOR DEPARTING PASSENGERS

Please leave yourself enough time.

To ensure ample time for parking, security screening and unanticipated delays, we urge you to arrive at your terminal *at least one hour* prior to the scheduled departure time of your flight.

When you arrive at LaGuardia: Drop off your luggage at your airline's curbside check-in, provided one is available, or at your airline's ticketing counter. Then proceed to the gate from which your flight is scheduled to depart.

If you are traveling with light luggage, you can avoid the traffic congestion on the departure roadway of the Main Terminal by using the alternate departure roadway which is located on the third level of the parking garage. This roadway does *not* have skycap service. It is intended for use by passengers carrying their luggage (a light suitcase) into the Main Terminal. From the alternate departure roadway, you can enter the Main Terminal through weather-protected connectors from the fourth level of the garage. The connectors can be reached from the alternate departure roadway and all levels of the garage via elevators or escalators and stairways.

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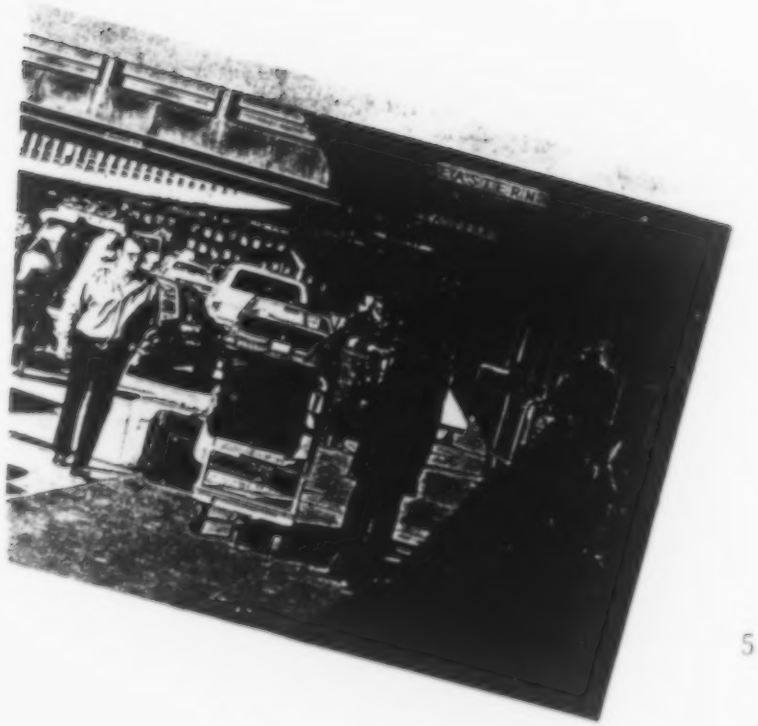
For everyone's security: To help ensure everyone's security, the Federal Aviation Administration requires all passengers to undergo security screening. This process requires that you walk through a security device and pass any hand-held luggage through an X-ray machine before boarding your flight. (Caution: If you have unexposed film in your carry-on luggage, notify the guard at the security check point. Some X-ray devices may damage unexposed film.)



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NOW THAT YOU'VE LANDED

INFORMATION FOR ARRIVING PASSENGERS

When your flight arrives at LaGuardia: Go directly to the baggage claim area to get your baggage. Information on public transportation can be found at one of the conveniently located Consolidated Ground Transportation Counters. There, knowledgeable staff provide accurate information, free of charge, on how to get to or from LaGuardia.

Pickup procedure for arriving passengers: Passengers arriving at the Main Terminal should be picked up at the Passenger Pickup Area, located on the lower level (arrivals) roadway across the street from the Main Terminal (see airport map). The Delta and Eastern Airlines Shuttle terminals also have similar curbside pickup zones. Cars can stand at these "no parking" areas for brief periods while *actively* loading passengers and luggage. *Unattended vehicles will receive parking tickets.* If a Passenger Pickup Area is congested, follow the traffic signs for parking in the metered lots, parking lots or the parking garage. Motorists meeting arriving passengers at the Marine Air Terminal or the Eastern Commuter Terminal should use the parking facilities which are near each of these terminals.

INFORMATION FOR PASSENGERS CATCHING ANOTHER FLIGHT

FREE BAGGAGE TRANSFER SERVICE

If you're connecting to another flight at LaGuardia, we urge you to take advantage of the free luggage transfer service offered by most airlines.

When you arrange in advance to have your baggage transferred, you're able to move about LaGuardia more freely, quickly and conveniently. And you arrive at your destination feeling fresh rather than frazzled.

How to arrange it: To arrange for free baggage transfer at LaGuardia, just follow these steps:

1. When purchasing your tickets, tell your travel agent or airline representative that you'd like your baggage transferred to your connecting flight at LaGuardia. Be sure to confirm that you have been ticketed as an "interline connecting passenger."
2. Before departing, remind airline personnel ticketing your luggage that you want your baggage transferred to your connecting flight. An appropriate tag will be affixed to your luggage.

PASSENGER SERVICES AT LAGUARDIA

In case you need the services listed below here's where they're available.

INFORMATION SERVICES AND ASSISTANCE

Police: For general assistance, ask any Police Officer for help. In an emergency, telephone *476-5111*.

Information: A desk is centrally located on the departures level (second floor) of the Main Terminal. It is staffed with "AppleAides," senior citizens from the local community who volunteer their time to assist LaGuardia's travelers. They are very knowledgeable about the airport and can also tell you how to get around New York. The AppleAide desk is staffed Monday thru Friday from 9 a.m. to 8 p.m., and from 2 p.m. to 6 p.m. on Sunday. The desk is closed Saturday.

Airport staff at the Manager's office *(718) 476-5000* (weekdays 9 a.m. to 5 p.m.) and at the Operations office *(718) 476-5072* (24 hours a day) are available to answer questions about LaGuardia. Refer questions concerning flight arrival and departure schedules to your airline.

Ground transportation information: LaGuardia has six Consolidated Ground Transportation Counters; four at the baggage claim area of the Main Terminal, and one each at the Delta and Eastern Airlines Shuttle terminal buildings. At these counters, knowledgeable staff will provide you with accurate information, free of charge, on how to get to and from LaGuardia. To obtain ground transportation information call *(718) 476-5157* (7:30 a.m. to 11:30 p.m.).

HEALTH AND HUMAN SERVICES

Medical services: Medical assistance is available at a privately operated office in the central part of Hangar 7, in the Marine Terminal area. The medical office is open weekdays from 8 a.m. to 4 p.m., *(718) 476-5575*. In a medical emergency, ask a police officer for help or call the police at *476-5111*.

Passenger Paging: This service can be arranged by calling the airline on which the passenger is arriving or departing. A complete listing of airlines and their telephone numbers is in the insert in the back pocket of this guide.

Assistance for the disabled: To obtain a wheelchair or to arrange for other types of assistance for the disabled, contact your airline representative. (See airline listing in the back pocket of this guide). Special rest rooms, telephones and other facilities for the disabled are provided at the airport.

PASSENGER SERVICES AT LAGUARDIA

For additional information concerning facilities for the disabled, write or call, and request the booklet *Airport Facilities and Services for the Disabled* from the Port Authority's Aviation Customer and Public Services Division, One World Trade Center, Room 65N, New York, NY 10048, or phone *(212) 466-7503*.

Nursery/Playground facilities: A child care nursery, containing two changing tables, is provided in the women's room, on the lower level of the Main Terminal, near the central lobby area. By taking a nearby escalator to the second floor, you can keep your toddlers occupied by obtaining free coloring books and puzzles from the airport's information counter in the central lobby area. Across from this information desk is KIDSPORT, a brightly colored area that has ride-on toys, a crawl-thru tunnel, slide and pint-sized tables and chairs for children to use while working on their coloring books and awaiting their flights.

PASSENGER CONVENIENCES

Banks, cash machines and foreign currency exchanges: You will find these facilities in most terminal buildings. Consult the chart on page 14 for specific locations.

Baggage storage: Baggage can be stored at Mutual of Omaha's travel insurance counter, located on the second floor of the Delta Terminal building *(718) 651-6725*. This is the only airport facility for baggage storage. It is open from 6 a.m. to 8 p.m., Monday thru Friday, and 7 a.m. to 3:30 p.m. on weekends.

Hotel reservations: Meegan Services, Inc., provides a hotel reservation service with desks or courtesy phones in the American, Trans World and Eastern Airlines arrival areas of the Main Terminal, and at the Delta and Eastern Airlines Shuttle terminal buildings *(718) 476-5587*. Hotel and motels near the airport may also be reached from courtesy telephones on the arrivals level of the Main Terminal and in the other terminals, or through your travel agent or airline representative.

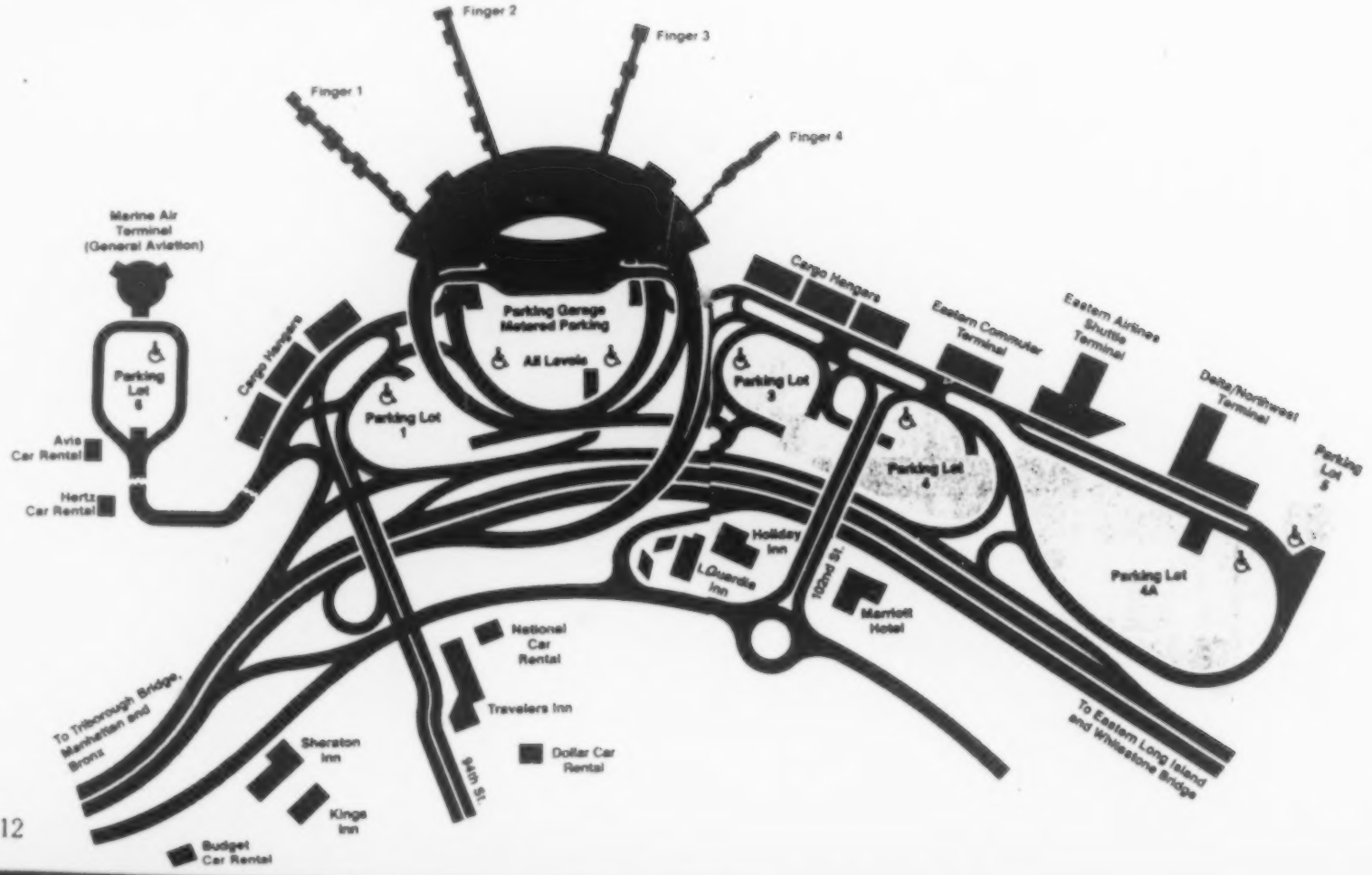
Hotels: Hotels and motels near the airport include: Holiday Inn *(718) 898-1225*, Kings Inn *(718) 656-5133*, Travelers *(718) 335-1200*, Marriott *(718) 476-5340*, Sheraton *(718) 446-4800* and the West Way *(718) 274-2800*.

Lost and found: To recover items lost in transit or in airline terminals, contact your airline representative first. If baggage cannot be located, call the Lost and Found office at the airport's Port Authority Police Headquarters *(718) 476-5115*.

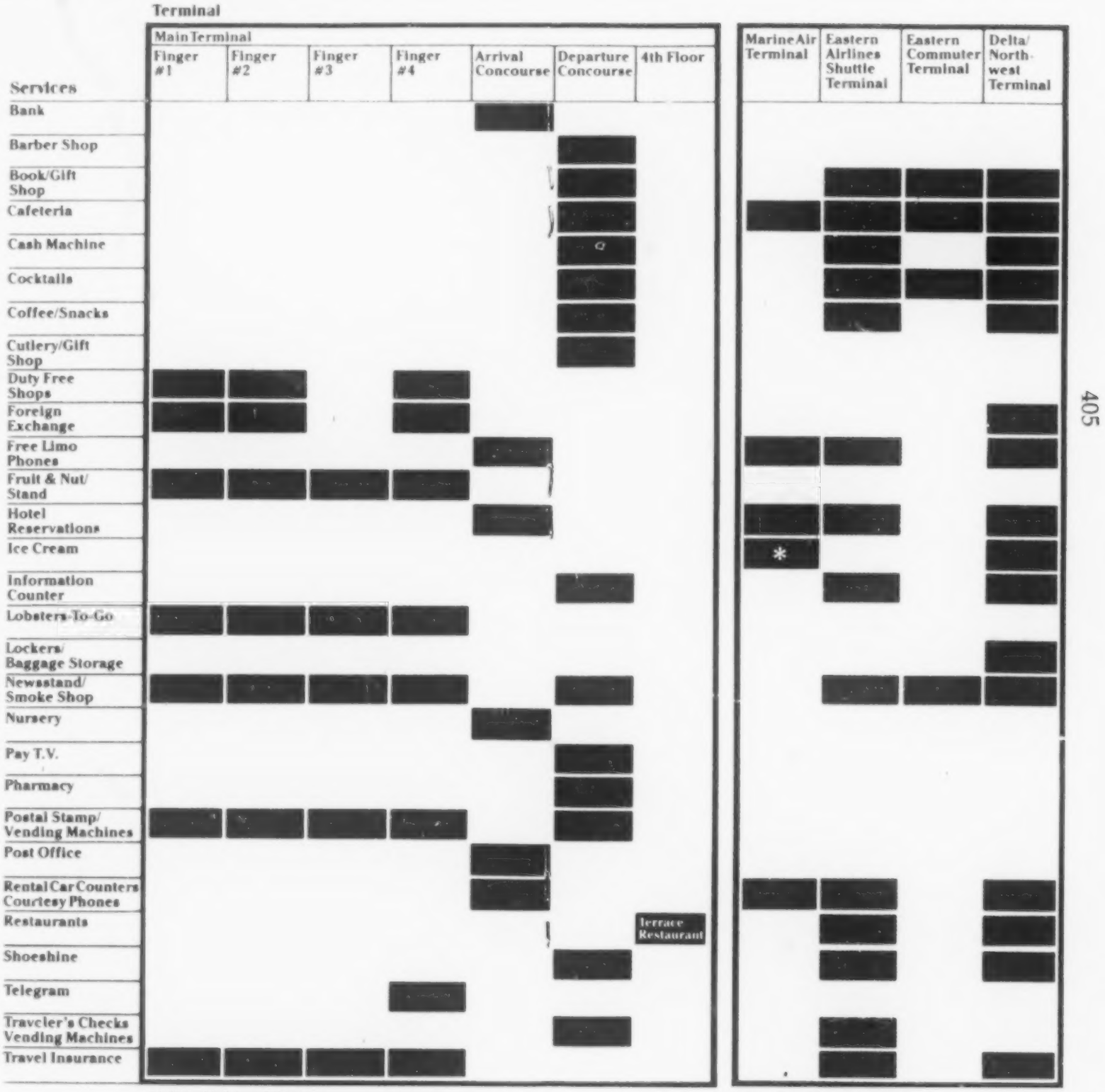
GOVERNMENT SERVICES

Post Office: A post office is on the lower level of the Main Terminal in the central lobby area. It is open from 9 a.m. to 3 p.m. on Monday and Tuesday, and from 9 a.m. to 4 p.m. Wednesday, Thursday and Friday. Phone *(718) 429-5689*. Mailboxes and stamp vending machines are positioned throughout the Main Terminal.

LAGUARDIA HIGHWAY/TERMINAL MAP



QUICK REFERENCE TO SERVICES



Airline Clubs — 3rd Floor

- American Airlines Admiral Club (Room W 307)
- TWA Ambassador Club (Room 3771)
- Eastern Airlines Ionosphere (Room 3711)
- US Air Club (Room 3760)

*** Vending Machines Only**

Conference rooms available at Terrace Restaurant
Marriott/Host (718) 476-5340

WHERE TO PARK YOUR CAR AT LAGUARDIA

LaGuardia has a parking garage, grade level lots and metered parking facilities for its patrons. Free bus service to the Main Terminal building is provided from 5 a.m. to 2 a.m. Extra-wide parking spaces for disabled motorists, identified by the international symbol for the disabled, are available in all parking facilities.

Detailed parking information and rates are in the insert in the back pocket of this book.

If you're parking at LaGuardia, dialing these telephone numbers can get you information or assistance fast.

Parking operator.....*(718) 429-5380*
Current parking and roadway status (taped message).....*(718) 476-5105*
Auto service .....*(718) 478-1812*
Airport information .....*(718) 476-5000*
Police .....*(718) 476-5115*
Airport operations .....*(718) 476-5072*

AIRPORT PARKING AND DRIVING TIPS

- All parking is on a first-come, first-served basis.
- Allow sufficient parking and driving time to arrive at your terminal one hour before flight time.
- Always lock your car and take your keys with you.
- Check your lights.
- Do not leave articles in the car.
- Note the section where you park on your ticket.
- Take the parking ticket with you.
- For assistance, contact attendant at exit booth.
- Motorists requiring towing or assistance are free to call the service station or auto club of their choice.

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SEAT BELT LAW

PLEASE OBEY SEATBELT LAWS.
THEY'RE FOR *YOUR* PROTECTION.

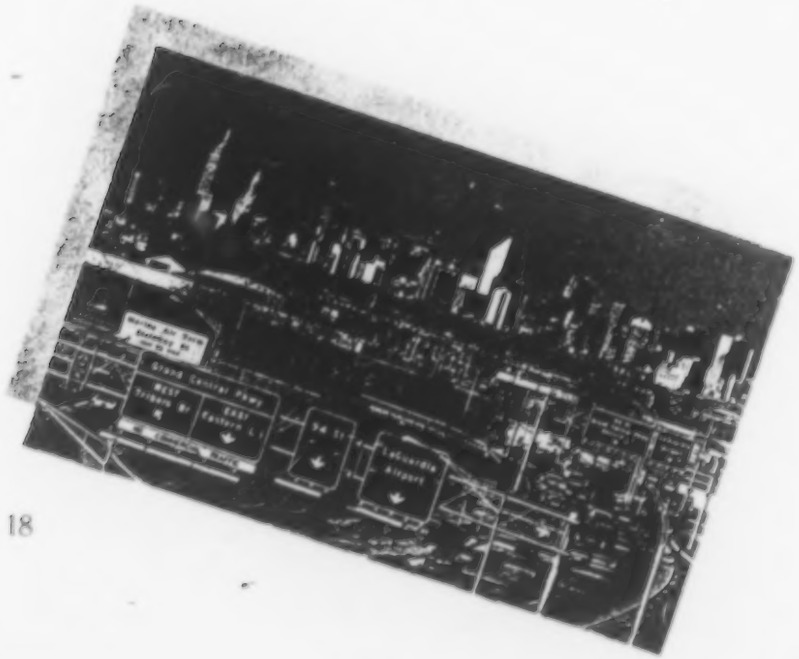
Visitors flying into LaGuardia and driving to other destinations are required by law to "buckle up" in New York, New Jersey and Connecticut. Violators of state seat belt laws are subject to fines.

For your safety, seat belts should be worn by:

- all front seat occupants
- all children under 10 anywhere in the vehicle

Children under four should be secured in a child-safety restraint device.

The driver is responsible for all passengers under age 16. Passengers 16 and over are responsible for themselves. Violators of the laws are subject to fines of up to $50.



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MAJOR AUTO ACCESS ROUTES TO LAGUARDIA

A - George Washington Bridge
B - Triborough Bridge
C - Lincoln Tunnel
D - Holland Tunnel
E - Brooklyn Battery Tunnel
F - Verrazano Narrows Bridge
G - Manhattan Bridge
H - Queens Midtown Tunnel
I - Whitestone Bridge
J - Goethals Bridge
K - Throgs Neck Bridge

Newark International Airport — immediately adjacent to the New Jersey Turnpike between exits 14 (north) and 13A (south) For the North Terminal, use exit #14. To Terminals A, B or C use exit #13A.

HOW WE TAKE THE WALKING OUT OF FLYING AT LAGUARDIA

GROUND TRANSPORTATION SERVICES

For prices, schedules and a complete listing of the companies offering the services listed below, consult the "Ground Transportation" section of the insert in the back pocket of this booklet.

WITHIN LAGUARDIA

Free parking lot and inter-terminal bus service: Free bus service is provided from the parking lots to the Main Terminal building every 10 to 15 minutes from 5 a.m. to 2 a.m. Since these yellow and white buses stop at all terminals, with the exception of the Marine Air Terminal Building, you can also use them to make a connecting flight. Passengers transferring to or from the Marine Air Terminal can request transportation by calling Butler Aviation at *(718) 476-5200.*

TO AND FROM LAGUARDIA

The listings that follow provide general information on ground and local air transportation services available to you at LaGuardia. For specifics, refer to the "Ground Transportation" section of the insert in the back pocket of this booklet.

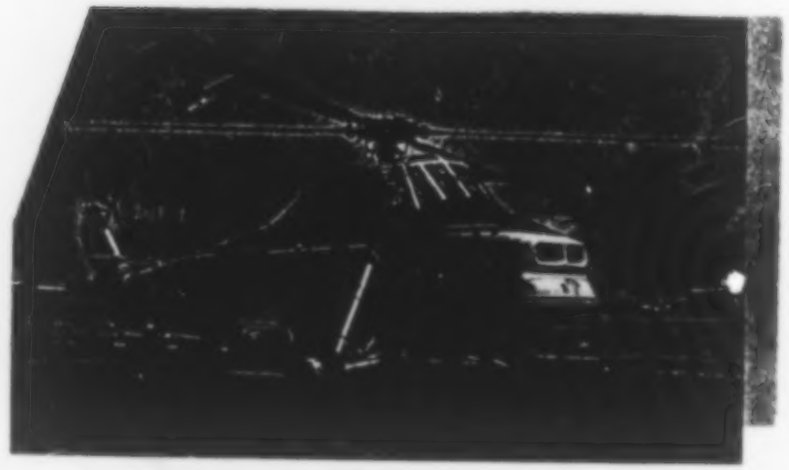
Bus Service: Express bus service is available to mid-Manhattan with a stop near Grand Central Station and shuttle service to the Port Authority Bus Terminal and Rockefeller Center. Bus service is also available to Brooklyn and the World Trade Center, located in downtown Manhattan (financial district). Public transit buses also provide service to the local community in Queens and connections to the New York City subway.

Taxi service: Taxis are available outside each terminal. To assist you in securing one, uniformed taxi dispatchers are on duty during peak travel hours. If you arrive during a nonpeak period and find no dispatcher on duty, you can hail a taxi on your own or request assistance from a Port Authority police officer.
For your security: Multilingual taxi information flyers are available at each taxi stand. After you have read it and secured a taxi, please note on this flyer your cab's identification number — located on the roof of the cab, between the "on" and "off" duty sign — in case you have a problem with the service provided.

Limousine service: Upon request, limousine services offer a single passenger or a group of passengers transportation in a wide array of vehicles — buses, vans, sedans, conference cars — to or from many destinations in the New York metropolitan area. Fares are based on a per person, hourly or flat rate. Arrangements can be made by visiting a Ground Transportation Counter in the baggage claim area of each terminal building.

Helicopter service: Helicopter service is available between LaGuardia and midtown Manhattan. Connections via helicopter are also available between LaGuardia and John F. Kennedy and Newark International airports.

Car rental services: In most of the terminals, you will find car rental counters operated by Avis, Budget, Dollar, Hertz and National. At other locations, use the courtesy telephones provided. Rental car return facilities for Avis and Hertz are located near the Marine Air Terminal. Upon returning to the airport, follow the roadway signing for rental car return. The Budget, Dollar and National car rental companies are located off-airport. And remember: *Buckle up for safety. It's the law.*



TRANSPORTATION FROM LAGUARDIA TO JOHN F. KENNEDY AND NEWARK INTERNATIONAL AIRPORTS

If you want to reach JFK or NIA in a hurry, there are four convenient transfer services to choose from. See the insert in the back of this booklet for details.

1. **Express bus service:** Express buses operate between LaGuardia and JFK and NIA on fixed schedules.
2. **Limousine service:** Limousines are available for inter-airport connections on a daily, regularly scheduled basis.
3. **Taxi service:** Taxis are readily available outside the arrivals area at all terminals.
4. **Helicopter service:** Many airlines offer free or reduced-rate inter-airport transfer via helicopter. For more information, contact your airline representative or travel agent.

ONCE AN AMUSEMENT PARK, NOW . . . ONE OF THE WORLD'S BUSIEST AIRPORTS

The present site of LaGuardia was first occupied by an amusement park.

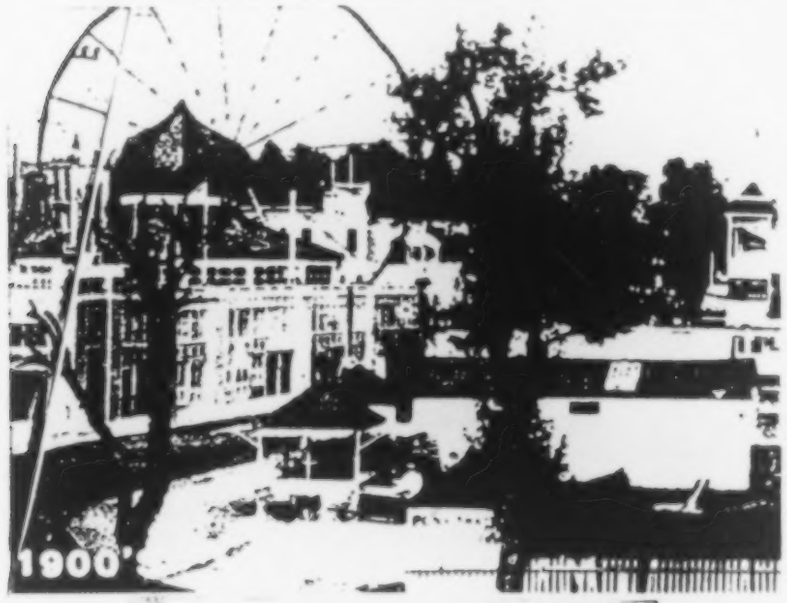
Transformed in 1929 into a 105-acre private flying field, it was later enlarged by purchasing adjoining land and filling in 357 acres of waterfront.

The airport bears the name of Fiorello H. LaGuardia, one of New York's most admired mayors who served from 1934 to 1945.

LaGuardia is located only 8 highway miles from midtown Manhattan.

Although it is only 650 acres in size, it handled 20 million passengers during 1985.

There are two main runways, each 7,000 feet long.



Almost 8,000 people are employed at LaGuardia to serve you.

LaGuardia has five passenger terminals: The Main Terminal accommodates most of the airport's flight activity; the Eastern Commuter Terminal is used by commuters for hourly flights to such destinations as Boston and Washington; and two new terminals have recently opened in the eastern section of the airport to meet the growing passenger demands of Eastern and Delta airlines; the Marine Air Terminal handles general aviation.

ABOUT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

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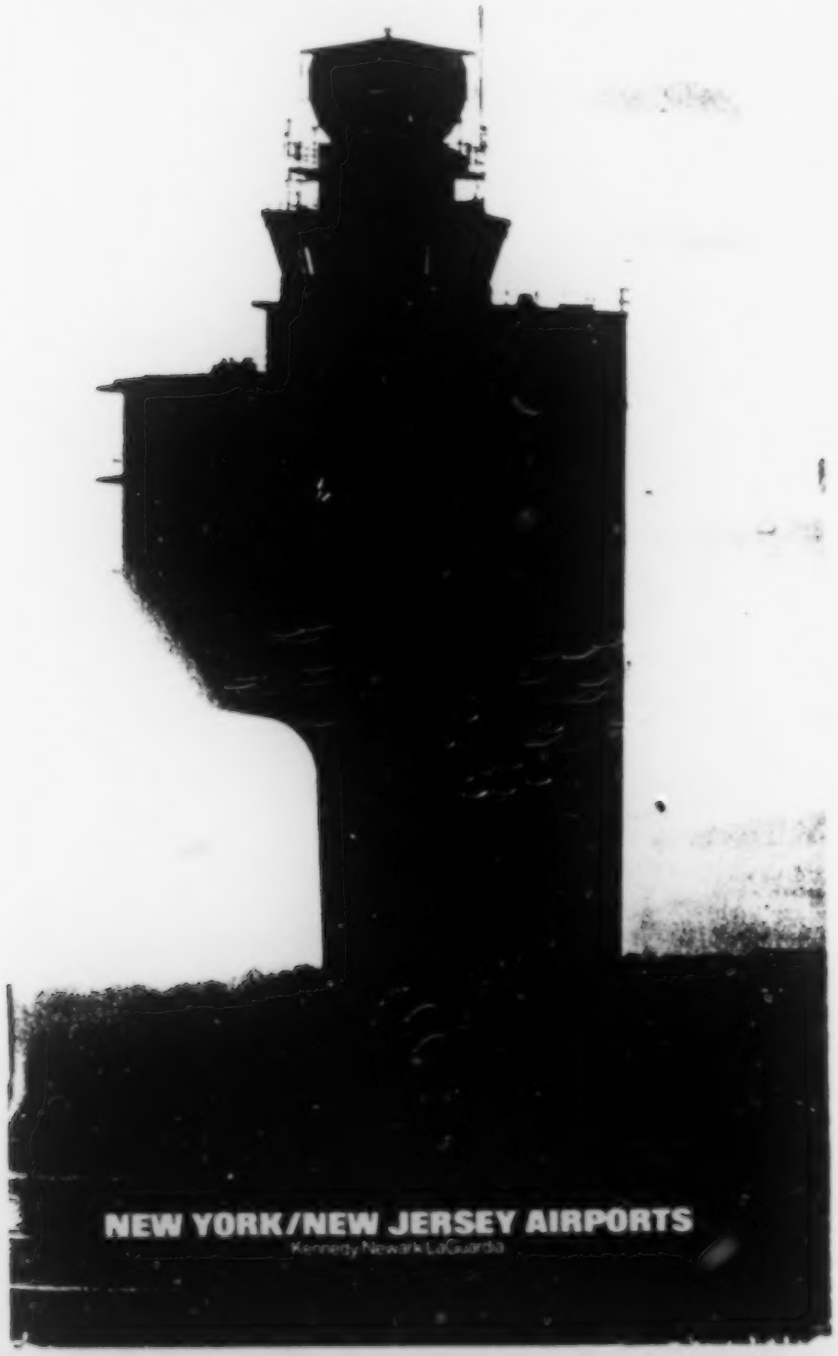
IN OUR POCKET

- How to get to, from and around LaGuardia
- Car rental information
- Parking lot information and rates
- Airline listing and locations
- Map of bus service to parking lots/terminals

EXHIBIT 10

GETTING AROUND AT NIA

A GUIDE TO NEWARK INTERNATIONAL AIRPORT



WELCOME!

Welcome to Newark International Airport. We hope you enjoy your stay.

Newark International Airport is constantly growing in order to serve you with convenient passenger and ground transportation services. Newark handled nearly 29 million passengers in 1985, making it one of the nation's fastest growing international airports.

Great strides are being made to keep up with this strong growth of air passenger and cargo traffic. Terminal C is currently being expanded so that by 1987 all passenger activity, including that currently at the North Terminal, will be handled in the Central Terminal Area. To satisfy the growing need for parking, new lots have been added and additional ones are planned. Plans are also underway to provide needed taxiways, roads and utilities to service the new buildings underway.

This Airport Guide has also been redesigned to better inform you and to help you find your way around our fast growing airport. In addition to the information offered in the following pages, please refer to the insert in the back pocket of the Guide. It contains the latest information about parking rates and ground transportation services.

Whether you're taking off or landing, we're happy to have you with us and hope you'll come this way again soon.

Sincerely,

Robert J. Aaronson
Director of Aviation
The Port Authority
of New York
and New Jersey

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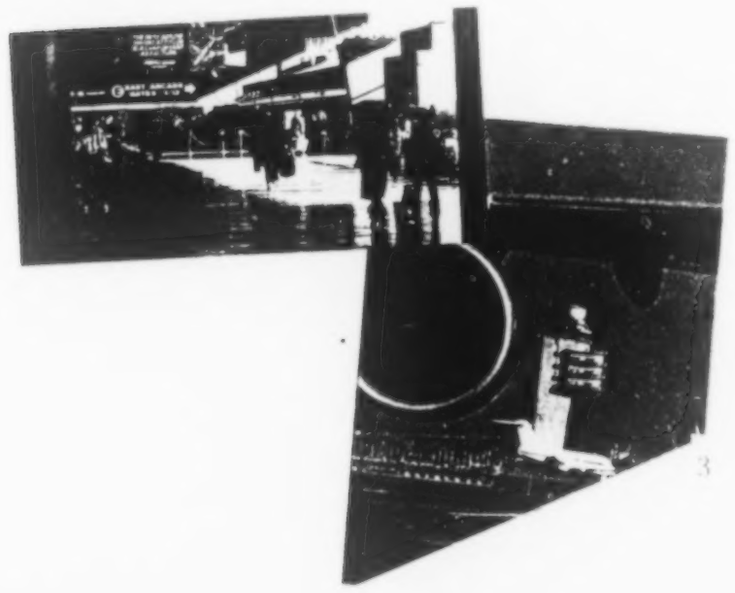
Cover photo by Chris Sorensen



NOW THAT YOU'VE LANDED . . .

INFORMATION FOR ARRIVING PASSENGERS ON INTERNATIONAL FLIGHTS

International flights requiring federal clearance arrive at Terminal C.

U.S. Immigration and Customs forms: While in flight, you will receive U.S. Immigration and Customs forms. To avoid delays, please fill out these forms *before you land*. And be sure to have your passport and health certificate in hand when you leave the plane.

Non-U.S. residents: If you are not a U.S. resident, a review of your passport and other documents is required by the U.S. Public Health Service and the Immigration and Naturalization Service.

U.S. Customs: All international passengers — both U.S. residents and nonresidents — then proceed to the baggage claim area and to U.S. Customs. At Newark, U.S. Customs has devised special procedures to help speed you through.

- Green lines are for those having nothing to declare to U.S. Customs.
- Red lines are for those with meats, fruits, plants or large amounts of currency who are required to undergo baggage inspection. Because of occasional spot checks you may be required to pass through the Red line.

INFORMATION FOR ARRIVING PASSENGERS ON DOMESTIC FLIGHTS

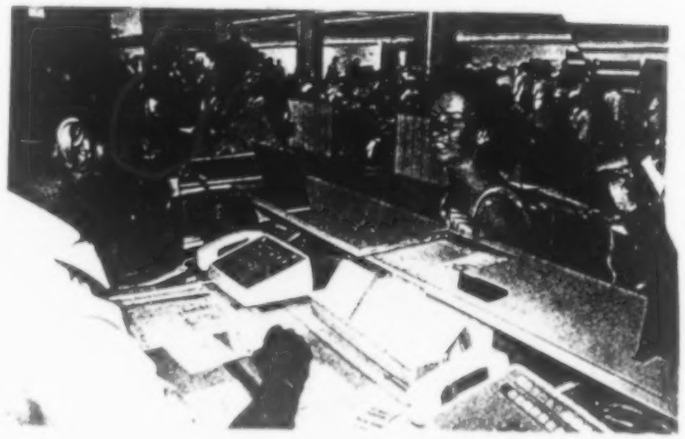
Passengers on domestic flights exit the plane and proceed directly to the baggage claim area.

INFORMATION FOR PASSENGERS CATCHING ANOTHER FLIGHT

When you arrange in advance to have your baggage transferred, you're able to move about NIA more freely, quickly and conveniently. And you arrive at your destination feeling fresh rather than frazzled.

How to arrange it: To arrange for free baggage transfer at NIA, just follow these steps.

1. When purchasing your tickets, tell your travel agent or airline representative that you'd like your baggage transferred to your connecting flight. Be sure to confirm that you have been ticketed as an "interline connecting passenger."
2. Before departing, remind airline personnel ticketing your luggage that you want your baggage transferred to your connecting flight. An appropriate tag will then be affixed to your luggage.



WHEN YOU'RE READY TO TAKE OFF . . .

INFORMATION FOR DEPARTING PASSENGERS

Please leave yourself enough time. To ensure ample time for parking, security screening and unanticipated delays, we urge you to arrive at your terminal at least one hour prior to the scheduled departure time of your flight.

When you arrive at NIA: Drop off your luggage at your airline's ticketing counter. Then proceed to the gate from which your flight is scheduled to depart.

Free baggage transfer service: If you're connecting to another flight at NIA, we urge you to take advantage of the free luggage transfer service offered by many airlines.

For everyone's security: To help ensure everyone's safety, the Federal Aviation Administration requires all passengers to undergo security screening. You must walk through a security device before boarding your flight and pass any hand-held baggage through an X-ray machine. (Caution: if you have unexposed film in your carry-on luggage, notify the guard at the security check point. Some X-ray devices may damage unexposed film.)

PASSENGER SERVICES AT NIA

Just in case you need any of the services below — here's where they're available.

INFORMATION SERVICES AND ASSISTANCE

Police: For general assistance, telephone (201) 961-2235. **In an emergency, telephone (201) 961-2233.**

Information: Information counters are located near doors 5 and 6 on the lower (arrivals) level in Terminals A and B, and next to exit door 8 in Terminal C. Staff provide accurate general information free of charge.

Ground Transportation: NIA's Ground Transportation Counters are located in the baggage claim areas of Terminals A and B, and next to door 8 on the lower (arrivals) level of Terminal C. Passengers using the North Terminal will find a Ground Transportation Counter staffed by Port Authority personnel next to door 1 in the bus waiting area.

HEALTH AND HUMAN SERVICES

Medical services: Private medical services are available at the Medical Clinic (Building 5) on Inner Port Street. Call (201) 961-2525.

Assistance for the disabled: It's always best to arrange *in advance* for the movement of a disabled person through the airport. When making your travel arrangements, notify your travel agent or airline representative if any member of your party has a disability and requires special assistance.

For information about NJ Transit's lift-equipped buses call 1-800-772-2287. For additional information concerning facilities for the disabled at NIA, telephone (201) 961-2154. A booklet, *Airport Facilities and Services for the Disabled*, detailing facilities at Kennedy International, LaGuardia and NIA, is available from the Port Authority of New York and New Jersey by calling (212) 466-7503.

Nursery facilities: Lounges containing changing tables and chairs are located in the women's restrooms on the concourse level in Terminals A and B and on the concourse level in the North Terminal.

Lost and found: To recover items lost aboard flights or in airline areas within terminals, contact your airline representative first. If your items cannot be located, call the main Lost and Found at (201) 961-2235.

Paging: You can have someone paged by calling the airline on which the passenger is arriving or departing.

PASSENGER CONVENIENCES

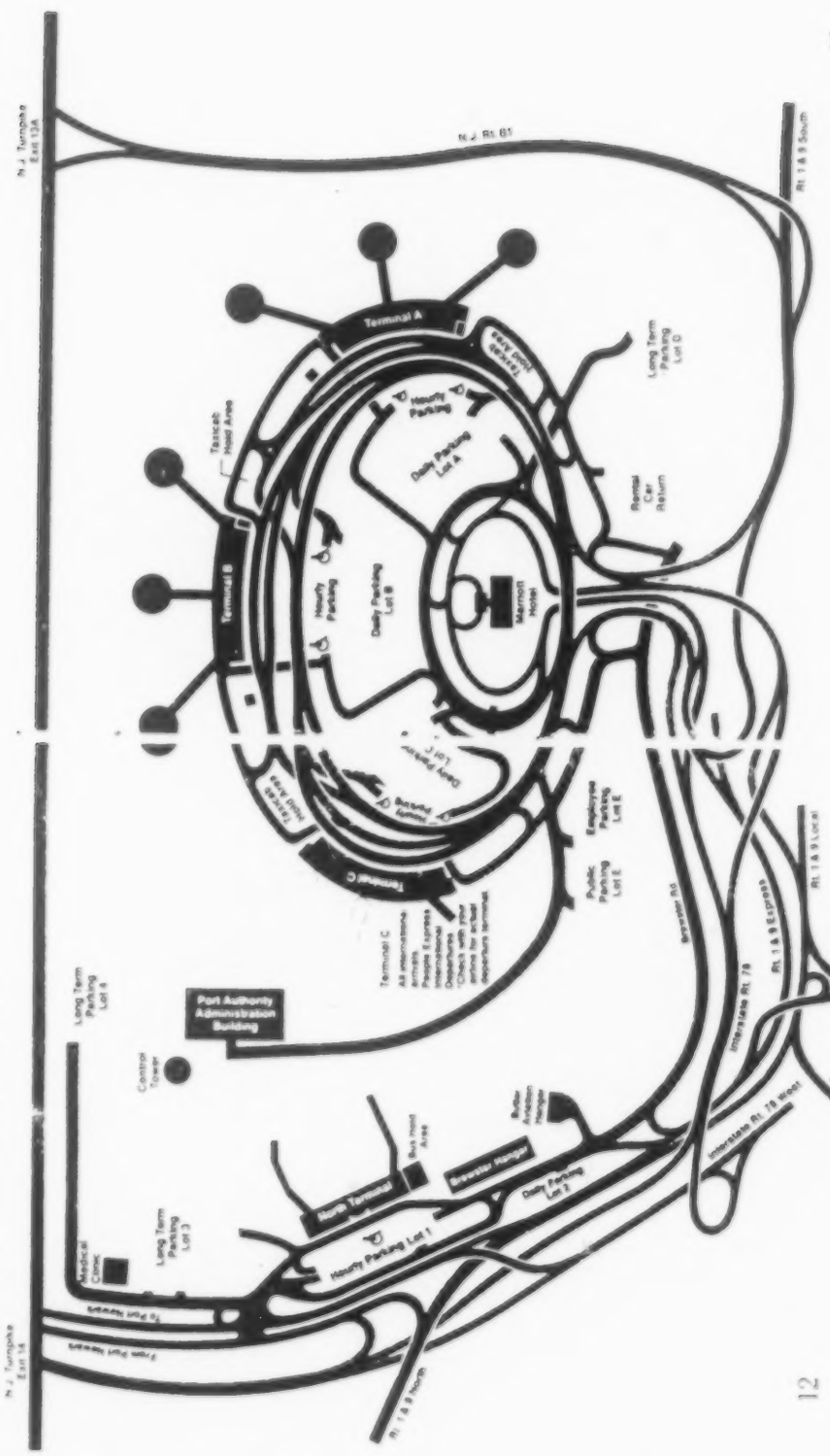
Banks, cash machines and foreign currency exchanges: These facilities are in most terminal buildings. For specific locations, consult the grid on page 14.

Baggage storage: Baggage lockers are located in Satellites B1, B2 and B3 of Terminal B. Luggage can be stored for a maximum of 24 hours at a charge of 50 cents.

On-site lodgings: The Newark International Airport Marriott is located in the Central Terminal Area and may be reached by calling (201) 961-2860. Other nearby hotels and motels may be reached through courtesy telephones conveniently located throughout the arrivals level in Terminals A and B and the North Terminal.

GOVERNMENT SERVICES

Postal Services: Mail slots and stamp vending machines are in Terminals A and B and the North Terminal.



NIA HIGHWAY/TERMINAL MAP

Services	Terminal A	Terminal B	Terminal C	North Terminal
Bank	C	C		C
Barber	C	C		
Book/Gift Shop	C	C		C
Cafeteria	C	C	D	C
Car Rental Counters/Phones	A	A		C
Cash Machine	C			
Cocktails	C/S	C/S	D	C
Coffee/Snacks	C/S	C/S	D	C
Duty Free Shop		C	D	C
Elevator for Disabled For assistance call 961-2154	A/D/C	A/D/C		
Foreign Currency Exchange		C	D	C
Hotel Reservations Phones	A	A		
Ice Cream	C	C		C
Information Counter	A	A	A	C
Limo Counters/Phones	A	A		
Lockers		S		
Mail Slots	C	C		C
Newsstand/Smoke Shops	C/S	C/S	D	C
Nursery	C	C		C
Pay TV			D	
Pharmacy	C			
Stamp Machines	C	C		C
Shoeshine	C			C
Telegram	C	C		
Ticketing	D	D	D	C
Travelers Checks/ Vending Machine	C	C		
Travel Insurance	C/S	C		C

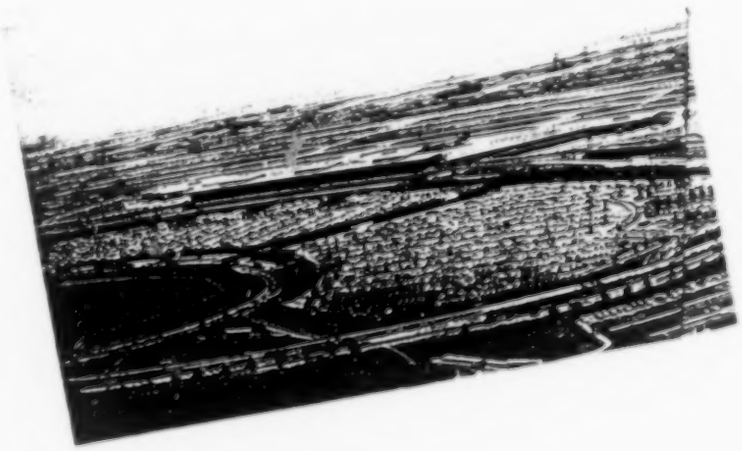
A = Arrivals Area
D = Departures Area
C = Concourse
S = Satellite Area

WHERE TO PARK YOUR CAR AT NIA

Where you park depends on how long you park. Lots are designated as hourly, daily and long term to suit your needs as described below. Parking lot rates and the schedule for the free parking lot bus can be found in the insert in the back of this booklet.

Hourly Lots: Hourly Lots A, B and C, in the Central Terminal Area, and Lot 1, across the street from the North Terminal, are intended for not more than three hours of parking and are primarily a convenience for picking up or dropping off passengers. *Note that this is the most expensive parking option available at NIA and, to keep spaces available for pickup and dropoff traffic, we must impose penalty fees for those parking for more than one day.*

Daily Lots: Daily Lots A, B and C, in the Central Terminal Area, and Lot 2, west of North Terminal, are intended for short term and/or overnight parking, usually for not more than 3 days.



Long-Term Reduced-Rate Lots: Long-Term Lots D and E, serving Terminals A, B and C, and Long-Term Lots 3 and 4, serving the North Terminal, are located on the airports outer boundaries. These lots offer reduced rates for the convenience of patron parking for more than three days. *Note that these are the least expensive of the parking options available, but are also located farthest from the terminals*. Free round-the-clock bus transportation is provided from these lots to the Central Terminal Area and the North Terminal. In some instances transfers may be required between parking lots and terminals. Refer to the insert at the back of this brochure.

Parking accommodations for disabled drivers: Reserved spaces specially designated for the disabled are available at reduced rates in Hourly Lots A, B and C immediately adjacent to Terminals A, B and C in the Central Terminal Area, and in Hourly Lot 1, across the street from the North Terminal. Only vehicles with appropriately marked license plates and/or municipal identification are eligible to park in these spaces. For additional information on parking and other airport services for the disabled, telephone (201) 961-2154 or write Aviation Customer and Public Services Division, The Port Authority of New York and New Jersey, One World Trade Center, Room 65N, New York, NY 10048.

If you're parking at NIA, dialing these telephone numbers can get you information or assistance, fast.

Current parking and roadway status (taped message) ..... *(201) 961-2012*
Parking operator ..... *(201) 961-4751*
Airport Auto Service ..... *(201) 961-5352*
Police ..... *(201) 961-2235*

When you park, take your car keys, registration and parking ticket with you. Lock your car. Don't leave items on your seat; lock them in the trunk. And remember, when you're driving, buckle your seat belt — it's the law.

MAJOR AUTO ACCESS ROUTES TO NIA

A - George Washington Bridge
B - Triborough Bridge
C - Lincoln Tunnel
D - Holland Tunnel
E - Brooklyn Battery Tunnel
F - Verrazano Narrows Bridge
G - Manhattan Bridge
H - Queens Midtown Tunnel
I - Whitestone Bridge
J - Goethals Bridge
K - Throgs Neck Bridge

Newark International Airport—immediately adjacent to the New Jersey Turnpike between exits 14 (north) and 13A (south). For the North Terminal, use exit #14. To terminals A, B or C use exit #13A.

HOW WE TAKE THE WALKING OUT OF FLYING AT NIA

GROUND TRANSPORTATION SERVICES

For prices, schedules and a listing of the companies offering the services listed below, consult the "Ground Transportation" section of the insert in the back pocket of this booklet.

WITHIN NIA

Free 24 hour bus service: If you're traveling between NIA's Central Terminal Area (Terminals A, B and C) and the North Terminal, take the brown and white connection bus on the upper (departures) level of Terminals A, B and C, outside doors 6 and 7, or from the bus loading area at the North Terminal. Buses providing quick connection service between Terminals A, B and C stop outside door 6 on the lower (arrivals) level.

Taxi service: Taxi stands are located on the lower (arrivals) level at Terminals A, B and C and at curbside in front of the North Terminal. Stands are attended during peak periods by a Taxi Dispatcher who will assist you.

Transportation for the disabled: A special van service is available to transport disabled individuals between terminals. This vehicle is equipped to accommodate disabled passengers and wheelchairs. Arrangements for use of this van should be made in advance through your airline or travel agent or through NIA's Terminal Services unit at (201) 961-2154.

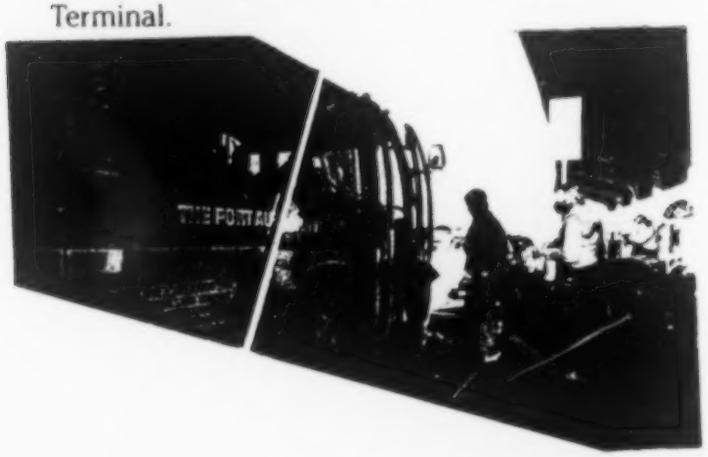
TO AND FROM NIA

The listings that follow provide general information on ground and local air transportation services available to you at NIA. For additional information, refer to the insert in the back of this publication or consult personnel at NIA's Consolidated Ground Transportation Counters located in the North Terminal and on the lower (arrivals) level of Terminal C. Knowledgeable staff will assist you, providing schedules and specific drop-off points.

Bus service: Several companies within the tri-state region provide bus service to and from NIA. For an up-to-date listing of bus companies and areas served, see the insert in the back of this brochure.

Airlink: Airlink mini-coaches connect Terminals A, B and C (stops on the lower or arrivals level) and the North Terminal with downtown Newark. Airlink runs a continuous schedule 18 hours a day and provides access to the New York/New Jersey area via eight rail lines and numerous bus routes operating from Penn Station, Newark.

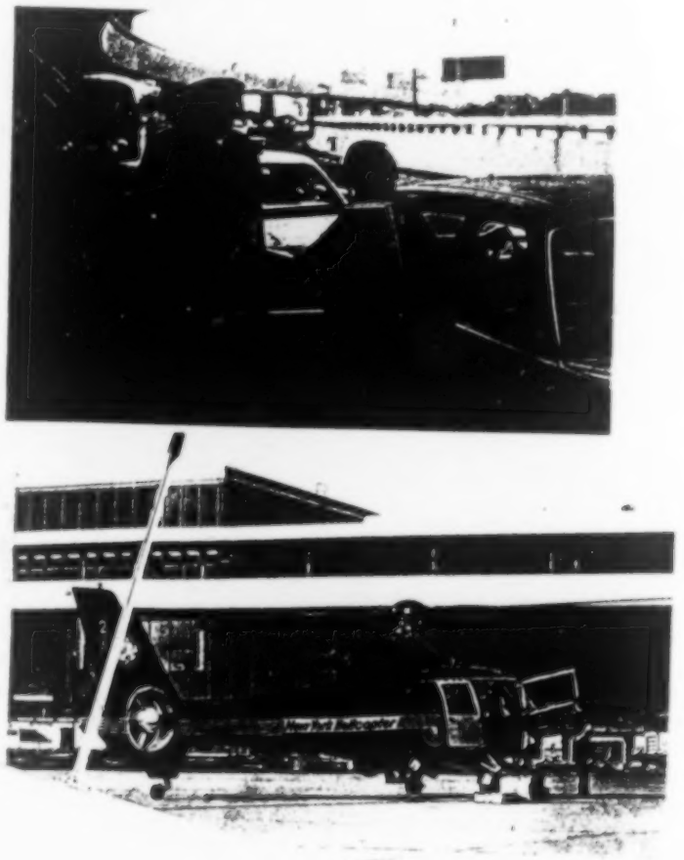
Limousine service: Limousine and bus services offer single passengers or groups transportation in a wide array of vehicles—buses, vans, sedans, conference cars—to or from most destinations on a per person, hourly or flat rate. Ground Transportation Counters are located on the lower (arrivals) level in Terminals A, B and C and on the concourse level in the North Terminal.



Taxi service: You will find taxis available at taxi stands outside each terminal. Flat rate fares apply to all destinations and representative fares are posted at the taxi stands. From 8 a.m. to midnight, special "share and save" group fares are available for up to four passengers traveling to Manhattan. Information and assistance are available from the taxi dispatcher or police officer at each taxi stand.

Car rental service: Car rental counters are located on the lower (arrivals) level in Terminals A and B and on the concourse level in the North Terminal. When unattended, direct line telephones are available at these counters and in Terminal C. Avis, Budget, Dollar, Hertz and National have car rental facilities at NIA.

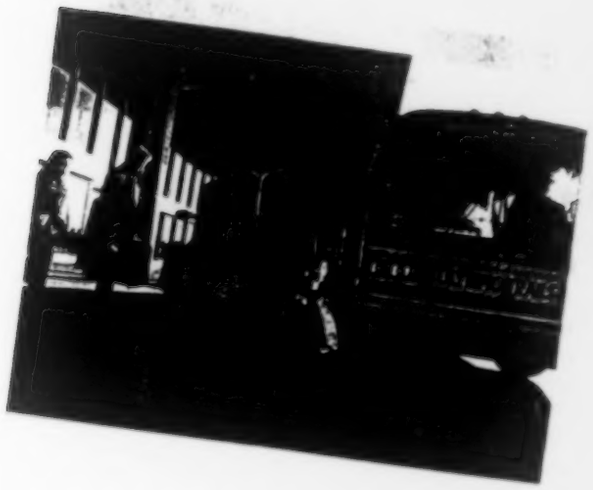
Helicopter service: Helicopter service is available between NIA and Kennedy International and LaGuardia airports.



TRANSPORTATION FROM NIA TO KENNEDY INTERNATIONAL AND LaGUARDIA AIRPORTS

If you want to reach Kennedy International or LaGuardia in a hurry, there are four convenient transfer services to choose from:

1. **Express bus service:** Express buses operate between NIA and Kennedy International and LaGuardia airports on fixed schedules.
2. **Limousine service:** Limousines are available for inter-airport connections on a regularly scheduled basis.
3. **Taxi service:** Please see "Taxi service" listing on page 22.
4. **Helicopter service:** Some airlines offer free or reduced-rate inter-airport transfer via helicopter. For more information, contact your airline representative.



FROM A PIONEERING PAST TO A SPLENDID PRESENT

Newark International Airport is one of the country's most modern and fastest growing airports.

NIA was the first commercial airport in the New York-New Jersey metropolitan area and has served the region since it first opened in 1928.

NIA is located in the heart of northern New Jersey's industrial center and is just 16 highway miles from mid-Manhattan. The airport is conveniently located on or accessible to virtually every major highway route in the region.

In addition to its beautiful, spacious terminals and a vast array of shops and services for the air traveler's convenience, NIA has some impressive statistics:

- NIA occupies 2,300 acres and has a working population of approximately 14,000.
- NIA's runways extend a total of 4.7 miles and are connected by more than 12 miles of taxiways.
- NIA's fuel storage facilities hold 10 million gallons of aviation fuel.
- A total of 28.6 million passengers traveled through NIA in 1985, making it the 8th busiest airport in the world.
- NIA, together with Kennedy International and LaGuardia airports, all operated by the Port Authority of New York and New Jersey, contribute $19 billion annually to the region's economic activity.

NIA is constantly growing and changing to serve you, our patrons, with a variety of conveniences, services and ground transportation.

We handled more than 28 million passengers in 1985 and we'd like to think we gave each one special care. If you have any suggestions as to how we can do it better, please write to:

The Port Authority of New York and New Jersey
Aviation Customer and Public Services Division
One World Trade Center — Room 65N
New York, NY 10048

ABOUT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

Newark International Airport is one of three airports operated by The Port Authority of New York and New Jersey.

Created in 1921, The Port Authority is a bi-state agency which undertakes port and regional improvements; provides dock facilities for the harbor shared by the States of New York and New Jersey; and, in general, promotes trade and commerce and operates transportation projects to maintain The Port of New York and New Jersey's position as America's preeminent gateway in the world's most dynamic region.

ABOUT THIS PUBLICATION

This booklet is produced by The Port Authority of New York and New Jersey in the public interest, for the widest possible dissemination of useful information to air travelers. It is not copyrighted. We encourage reprinting in any appropriate form, including reproduction of this booklet in its entirety, or through adaption of the visuals or text.

Extra copies of this publication — as well as published guides to Kennedy International and LaGuardia airports — can be obtained by writing to: The Port Authority of New York and New Jersey, Aviation Customer and Public Services Division, One World Trade Center — Room 65N, New York, NY 10048 or by calling (212) 466-7503.

Published by the Aviation Customer and Public Services Division, Aviation Department, The Port Authority of New York and New Jersey.

IN OUR POCKET

- How to get to, from and around NIA
- Car rental information
- Parking lot information and rates
- Airline listing and locations
- Airport map

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,	:	75 Civ. 5388 (MJL)
Plaintiffs,	:	CIVIL RULE 3(g) STATEMENT OF DEFENDANT SUPERINTENDENT OF PORT AUTHORITY POLICE
-against-	:	
WALTER LEE, etc., et al.,	:	
Defendants.	:	

Pursuant to Rule 3(g) of the Civil Rules of the United States District Court for the Southern District of New York, defendant Superintendent of Port Authority Police submits the following:

A. STATEMENT OF CONTROVERTED FACTS

Defendant Superintendent of Port Authority Police submits the following statement controverting the Statement of Facts In Support of Motion for Summary Judgment dated November 11, 1987 submitted by plaintiffs (hereinafter "Plaintiffs' 3(g) Statement"):

1. Paragraph 8 of Plaintiffs' 3(g) Statement is incorrect insofar as it does not reflect the merger of Northwest Airlines and Republic Airlines, Inc. and of Ozark Airlines and Transworld Airlines, respectively.

2. Paragraph 18 of Plaintiffs' 3(g) Statement is incorrect insofar as it does not reflect the presence of the Flight Board on the mezzanine of the IAB.

3. Paragraphs 21 and 22 of Plaintiffs' 3(g) Statement is incorrect in their description of the facilities in the East Wing, second floor of the IAB. In the East Wing, second floor, the corridors are boarded by four duty-free shops, two bars, a snack bar, bank, currency exchange, bookstore, newsstand, a newsstand, cookie/candy shop, two travel insurance areas, and a retail Bloomingdales. The East Wing corridor also includes seating facilities, two free standing commercial advertising displays and two free standing public service advertising displays.

4. Paragraph 23 of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities of the West Wing corridor of the IAB. The West Wing corridor is boarded by four duty free shops, a newstand, book store, currency exchange, a snack bar, cookie/candy shop, a cash/traveler's check machine, two bars and two travel insurance facilities. The corridor also contains seating areas, two free standing commercial advertising displays and one free standing public service advertising display.

5. Paragraph 27, second sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities in the rear corridor of the Pan American unit terminal. In the rear corridor are two duty free shops, one currency exchange, a travel insurance facility, cocktail lounge, cafeteria, a toy shop, a bookshop, gourmet food shop, newsstand, restaurant, bank, and retail Bloomingdales.

6. Paragraph 32 of plaintiffs' 3(g) statement is incorrect in its description of the facilities located in the rear

corridor of the Northwest/Delta unit terminal. The rear corridor is bordered by two gift shops, a coffee shop, postal facility, newsstand, cutlery shop, restaurant/lounge, cookie shop, shoeshine stand and two duty free shops.

7. Paragraph 34, fourth sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities located in the corridor of the United unit terminal. Located in the corridor are two currency exchanges, one gift shop, one newsstand, one cocktail lounge, a duty free shop, restaurant, coffeeshop, bank, postal facility, shoeshine stand, travel insurance facility, and traveler's check/cash machine.

8. Paragraph 36, second sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities located in the main departure level of the American Airlines unit terminal. The main departure level contains a ticketing/baggage check-in area, seating areas, and commercial establishments, including a bank, one restaurant, two snack counters, two gift shops, two traveler's check/cash machines, a currency exchange, duty free shop, cocktail lounge, newsstand, and shoeshine stand.

9. Paragraph 39, third sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities located in the back corridor of the British Airways unit terminal. The property is bordered by two cocktail lounges, a nursery, gift shop, duty free shop, newsstand, cookie/candy store, cafeteria, postal facility, travel insurance area, currency exchange, and a bank.

10. Paragraph 52, fifth sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the "AIDS

information table" in the central lobby area of the CTB. The area contains an "Apple Aide" information table. "Apple Aides" provide information to travelers.

11. Paragraph 53 of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities in the fingers of the CTB. Located at the end of the four fingers are a newsstand, postal facility, currency exchange, snack bar, fruit and nut stand, duty free shop, lobster stand, package fruit stand, and traveler insurance facility.

12. Paragraph 56, the third sentence, of Plaintiffs' 3(g) Statement, is incorrect in its description of the facilities located on the third floor of the CTB. Airline clubs and airline offices are located on the third floor.

13. Paragraph 57, second sentence, of Plaintiffs' 3(g) Statement is incorrect in its description of the facilities of the Eastern Commuter Terminal. The Eastern Commuter Terminal contains no passenger service facility; it only contains ticket/baggage check in counters, boarding gate areas and baggage retrieval facilities.

14. Paragraph 58, third sentence, of Plaintiffs' 3(g) Statement, does not correctly describe the facilities on the arrivals level of the Eastern Shuttle Terminal. The arrivals level includes a baggage retrieval area, newsstand, cash machine, snack bar, car rental and hotel reservation counters, and a consolidated ground transportation counter for airport car, limousine and bus services.

15. Paragraph 60 of Plaintiffs' 3(g) Statement does not correctly describe the facilities on the arrivals level of the Delta/Northwest unit terminal. The arrivals level consists of a baggage retrieval area, car rental and hotel

reservation counters, and a consolidated ground transportation counter for airport car, limousine and bus service.

16. Paragraph 87, first sentence, of Plaintiffs' 3(g) Statement is incorrect. The aviation capital plan contemplates an expenditure of $3.2 million for new projects at La Guardia airport.

17. Paragraph 90, first sentence, of Plaintiffs' 3(g) Statement is incorrect. The real estate of the three airports, as well as the structures and improvements situated thereon, is owned by the cities of New York, Newark, New Jersey, and Elizabeth, New Jersey, and are held by the Port Authority pursuant to long term ground leases.

18. Paragraph 101 of Plaintiffs' 3(g) Statement is incorrect. The Port Authority advanced the funds necessary to construct the Northwest Airlines unit terminal at John F. Kennedy International Airport, and following completion of the construction, Northwest repaid the Port Authority at 5.5 percent interest per annum.

19. Paragraph 103 of Plaintiffs' 3(g) Statement is incorrect. The Port Authority advanced the funds necessary to construct the TWA unit terminal at JFK and following the completion of construction, TWA repaid the Port Authority at 5.5 percent interest per annum. British Airways constructed the British Airways unit terminal at JFK, and obtained funds therefor from a consortium called BIDL, Inc.

20. Paragraph 121, second sentence of Plaintiffs' 3(g) Statement is incorrect. That sentence should state as follows:

> "In common with other airlines, they lease, maintain, and operate concourse corners leading to departure gates."

21. Paragraph 128 of Plaintiffs' 3(g) Statement is incorrect. It should contain the phrase "except for exclusively leased areas" after "La Guardia Airport" and before "including" in the second line.

22. Paragraph 129, second sentence of the Plaintiffs' 3(g) Statement is incorrect. It should contain the phrase "except to the common corridor in the four concourses, excluding structural maintenance" between the words "repairs" and "replacements".

23. Paragraph 137, first sentence, of Plaintiffs' 3(g) Statement is incorrect. The sentence should state as follows:

> "Delta and Eastern Airlines may each select its own airport operator to manage its facilities in its La Guardia unit terminal, subject to Port Authority approval."

24. Paragraph 138, first sentence, of Plaintiffs' 3(g) Statement is incorrect. The phrase "and Eastern" should appear after the word "Delta".

25. Paragraph 140 of Plaintiffs' 3(g) Statement is incorrect. At Newark, at JFK wing, and the other terminals, a flat rental fee on space for travel insurance, newsstand, and gift shop facilities is paid directly to lessees. The Port Authority receives a percentage of the gross

receipts generated by such facilities, up to an amount equal to the basic rental fee. The amount of the gross receipts fee exceeding the amount equal to the basic rental fee is divided equally by the Port Authority and the airline lessees.

26. Paragraph 143, first and second sentences, of Plaintiffs' 3(g) Statement are incorrect. The Port Authority does not maintain a restaurant in the common area. In areas not leased to airlines, the Port Authority arranges for contractors to provide supplemental consumer services such as newsstands, air transportation insurance, vending machines, and advertising displays if an airline desires such services.

27. Paragraph 147, first sentence of Plaintiffs' 3(g) Statement is incorrect. The first clause of the sentence should state as follows:

> "at the unit terminals and the central terminals at JFK, Newark and La Guardia,"

28. Paragraph 149, first sentence of Plaintiffs' 3(g) Statement is incorrect. The sentence should begin

> "at JFK, Newark and La Guardia, the Port Authority . . . "

B. STATEMENT OF FACTS AS TO WHICH THERE EXISTS NO ISSUE TO BE TRIED

Defendant Superintendent of Port Authority Police submits the following statement of material facts as to which he contends there is no issue to be tried:

29. The airport terminals that are under Port Authority control are the Central Terminal Building (hereinafter "CTB") of La Guardia, the Arrivals Building of the International Arrivals Building (hereinafter "IAB") of Kennedy, and the North Terminal at Newark. The other passenger terminals at the Port Authority airports are controlled by the airline tenants who lease those terminals. (Affidavit of Morris Sloane, sworn to on January 19,1988 (hereinafter "Sloane Aff."), ¶4)

30. Port Authority policy prohibits the continuous and repetitive distribution of literature and solicitation of money from passers-by in the airport terminals under Port Authority control. (Sloane Aff., ¶5)

31. Despite the Port Authority policy stated in Paragraph 30, pursuant to agreement between plaintiffs and the Port Authority entered into in open court before United States District Judge Robert L. Carter in 1974, the Port Authority permits leafleting and solicitation in the terminals under Port Authority control to grant plaintiffs access to those terminals *pendent lite*. The Port Authority permits leafleting and solicitation from 9:00 A.M. to 9:00 P.M. in the main lobby of the second floor of the CTB, on the second floor of the Arrivals Building of the IAB, and on the entire concourse of the Main Terminal of the North Terminal at Newark. (Sloane Aff., ¶6)

32. The Port Authority does not have the right to impose, and does not impose, restrictions on non-commercial leafleting and solicitation in airline terminal space leased to airlines. (Sloane Aff., ¶7)

33. Airport-wide restrictions on commercial activity are not applicable to non-commercial activity. (Sloane Aff., ¶7)

34. Members of the Port Authority police force neither patrol nor are stationed in the portions of the airline leased areas to which the plaintiffs seek entry. Port Authority police are only required to respond to screening check points in those areas pursuant to Federal Aviation Administration Regulations. (Sloane Aff., ¶8)

35. The Port Authority cannot impose upon the airline lessees rules regarding what non-commercial, non-airline activity may or may not be conducted in space within each airline's control. (Sloane Aff., ¶9)

36. Each airline is responsible for conducting operations in its leased space. (Sloane Aff., ¶9)

37. Each airline is responsible for maintaining security under the Federal Aviation Administration Regulations in Parts 107, 108 and 129 of Title 14 of the Code of Federal Regulations. (Sloane Aff., ¶9)

38. The Port Authority has the right to object to activity in leased space that creates conditions that are safety hazards or that interfere with operations. (Sloane Aff., ¶9)

39. The only purpose of all three of the Port Authority airports is the facilitation of air passenger and air cargo transportation. (Sloane Aff., ¶11)

40. The only purpose of the passenger terminals at the Port Authority airports that are the subject of this lawsuit is the facilitation of passenger air travel. (Sloane Aff., ¶12)

41. All planning and operational decisions that are made with regard to the Port Authority airport terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft. (Sloane Aff., ¶12)

42. Decisions regarding the number and location of boarding gates, placement of ticket counters, providing passenger information, the number and types of consumer services at Port Authority airports all have as their goal assisting the air passenger to reach his or her destination as quickly as possible, and to make any time spent in the terminal as convenient and pleasant as possible. (Sloane Aff., ¶12)

43. Port Authority airport operations are financed by user fees, not by the general tax revenues of any state, county or city. These user fees are rentals paid by airline tenants (such as the airline defendants in this suit), landing, terminal and ramp gate fees paid by individual and corporations for use of the airports by itinerant and lessee aircraft, fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by air passengers (such as parking lot fees). (Sloane Aff., ¶13)

44. The Port Authority, which has no power to levy or collect taxes and whose financial obligations are not guaranteed by any other government body, must operate as a self-sustaining enterprise. The Port Authority must raise the funds necessary for the improvement, construction or acquisition of its facilities by reliance upon its

reserve funds and its future revenues. In the past, such moneys have been supplemented in certain cases by federal and state contributions. (Sloane Aff., ¶14)

45. The Port Authority raises funds for capital improvements through the sale of consolidated revenue bonds. However, airport revenues are sufficient to cover all airport operating and capital expenses. (Sloane Aff., ¶15)

46. The limited portion of airport capital funds received from the federal government are grant monies derived from airport user fees pursuant to the relevant statutes in Titles 26 and 49 of the United States Code. (Sloane Aff., ¶16)

47. The airport terminal concourses are designed to facilitate the movement of departing passengers and their baggage into the airport terminals, to their ticketing/check-in facilities, and to their boarding gates and onto their airplanes; similarly, airports are designed to facilitate the movement of arriving air passengers out of their airplanes, into the terminals, to the baggage claim area and onto ground transportation vehicles. Concourses are designed to permit the quickest possible movement from the point of the passenger's arrival at the airport, by ground or air, to his or her point of departure. (Sloane Aff., ¶17)

48. A pedestrian delay of minutes or even seconds can cause a traveler to incur substantial loss in travel time, and possibly additional costs, because of a missed plane. (Sloane Aff., ¶17)

49. Airport pedestrian congestion is the Port Authority airports' single greatest problem. (Sloane Aff., ¶20)

50. Many of the concourses in the existing terminals at the Port Authority airports were designed before the development and use of wide body aircraft. (Sloane Aff., ¶18)

51. Passenger terminals at Port Authority airports that were designed before the development and use of wide body aircraft are overloaded with pedestrians during peak hours to handle the enormous surges of passengers from these huge aircraft. (Sloane Aff., ¶18)

52. Pedestrian routes in airports are heavily congested during peak travel hours, and the timing and duration of these peak periods are subject to considerable fluctuation. Generally speaking, the peak usage periods at Kennedy are 3:00 to 10 P.M.; the peak usage periods at LaGuardia are 7:00 to 10:00 A.M. and 3:00 to 9:00 P.M.; and the peak usage periods at Newark are 8:00 A.M. to 10:00 A.M. and 5:00 to 10:00 P.M. These peak periods are subject to being lengthened and changed because of weather conditions, mechanical difficulties in aircraft, airline hubbing activities and other factors. (Sloane Aff., ¶19)

53. The introduction of, and increase in use of, large capacity aircraft since the construction of the terminals at the Port Authority airports has resulted in a continuing and growing pedestrian congestion problem. (Sloane Aff., ¶19)

54. In 1985, a Port Authority's staff evaluation analysis of expansion plans for the IAB indicated that the existing IAB lobby serves as a meeter/greeter waiting area and an information center. It also provides access to a variety of transportation modes. This creates excessive crossflows, confusion, and crowding to the point that the operation is severely hindered during the peak hours. The current IAB Interim Improvement Program would alleviate some of the problems noted above but the existing 20,000 square foot lobby could never provide the level of service which would be provided by the 48,000 square foot lobby recommended for the projected 50% increase in the peak hour occupancy. (Sloane Aff., ¶20)

55. Due to landside congestion, the Port Authority adopted a "perimeter" rule at La Guardia, its smallest airport. The perimeter rule cuts down on landside congestion by prohibiting the congestion inducing long haul passenger aircraft from using La Guardia airport. Generally speaking, the rule prohibits any flight to or from La Guardia whose proximate origin or destination is more than 1500 miles from La Guardia. A complete statement of the nature and purpose of the perimeter rule is set forth in detail in *Western Airlines, Inc. v. Port Authority*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *pet. for cert. filed sub nom, Delta Air Lines, Inc. v. Port Authority*, No. 87-333. (Sloane Aff., ¶21)

56. Airport congestion has caused the Port Authority to plan extensive capital alterations to its airports. These improvements will require the expenditure of a projected $2.4 billion for the period of 1987-1991, and additional monies thereafter. (Sloane Aff., ¶22)

57. The sole purpose of the planned capital improvements to Port Authority airports is to reduce landside congestion and facilitate pedestrian movement within the passenger terminals at the Port Authority airports. (Sloane Aff., ¶22)

58. The Port Authority airport terminals contain "captive audiences" at virtually every location where people can congregate. (Sloane Aff., ¶23)

59. Persons waiting in an airline terminal for an airplane to arrive or leave normally remain in a specific waiting area. (Sloane Aff., ¶23)

60. Persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction. (Sloane Aff., ¶23)

61. Each of the Port Authority's airports is isolated from the surrounding community by highways. (Sloane Aff., ¶24)

62. The airport terminal concourses are not used as thoroughfares to or from destinations within the surrounding communities, nor as gathering places for community activities.(Sloane Aff.,¶24)

63. Virtually all of the persons in the airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes. (Sloane Aff., ¶24)

64. Air travel passengers comprise 80% of the persons in the airport terminals, "meeters and greeters" comprise 15%, and employees of airlines and other airport related businesses comprise 5%. (Sloane Aff., ¶24)

65. Airports, including the Port Authority airports, have unique security concerns. The history of skyjacking and other forms of terrorism at airports, including the 1975 bombing at La Guardia Airport which caused the death of 11 people and injured 72 people, necessitates the maintenance of security precautions found in few places in our society, including the mandatory screening of air passengers, as required by Parts 107, 108, 109 and 129 of Title 14 of the Code of Federal Regulations, as amended by 52 Fed. Reg. 48508 (December 22, 1987). (Sloane Aff., ¶25)

Dated: New York, New York
January 19, 1988

Respectfully submitted,

PATRICK J. FALVEY
Attorney for Defendant
Superintendent of
Port Authority Police
One World Trade Center – 66E
New York, New York 10048
(212) 466-8794

By: /s/ Arthur P. Berg
ARTHUR P. BERG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. et al., Plaintiffs, -against- WALTER LEE, etc., et al., Defendants.	75 Civ. 5388 (MJL) AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PRELIMINARY INJUNCTION

COUNTY OF NEW YORK :
ss:
STATE OF NEW YORK :

MORRIS SLOANE, being duly sworn, says:

1. I am presently Director of the Aviation Operations for the Aviation Department of the Port Authority of New York and New Jersey (hereinafter after called "the Port Authority"). From December 1973 to September 1987 I was deputy Director of the Aviation Department.

2. I submit this affidavit in opposition to plaintiffs' motion for summary judgment and a permanent injunction or, in the alternative, for a preliminary injunction prohibiting the enforcement of the policy on the distribution of literature and solicitation of money applicable to the passenger terminals controlled by Port Authority in John F. Kennedy International Airport (hereinafter "Kennedy"), LaGuardia Airport (hereinafter "LaGuardia"),

and Newark International Airport (hereinafter "Newark"). (Hereinafter, the three airports will be collectively referred to as "the Port Authority airports".)

3. From 1973 to the present, my responsibilities have included overall management of the day-to-day operations of the Port Authority airports. In the context of the Port Authority airports, "operations" refers to the movement of passengers and vehicles into and out of the airports, and the continuous traffic, maintenance, and security functions attendant thereto. In supervising airport operations, I must constantly acquire, update and apply my knowledge of how the Port Authority airports actually function to facilitate the safe, efficient and convenient movement of passengers and cargo to their destinations. In addition, I must acquire, update and apply my knowledge of how the ancillary passenger and airport services function. In fulfilling my responsibilities, I have participated in and reviewed decisions regarding the planning and design of Port Authority airport terminals, and the financing of airport operations and capital improvements. My position requires that I be aware of relevant airport industry policies, practices and experiences, and I have gained and used such knowledge in the course of my career.

4. The airport terminals that are under Port Authority control are the Central Terminal Building (hereinafter "CTB") of La Guardia, the Arrivals Building of the International Arrivals Building (hereinafter "IAB") of Kennedy, and the North Terminal at Newark. The other passenger terminals at the Port Authority airports are controlled by the airline tenants who lease those terminals.

5. Port Authority policy prohibits the continuous and repetitive distribution of literature and solicitation of money from passers-by in the airport terminals under Port Authority control.

6. Pursuant to agreement between plaintiffs and the Port Authority entered into in open court before United States District Judge Robert L. Carter in 1974, the Port Authority permits leafleting and solicitation in the terminals under Port Authority control to grant plaintiffs access to those terminals *pendent lite*. The Port Authority permits leafleting and solicitation from 9:00 A.M. to 9:00 P.M. in the main lobby of the second floor of the CTB, on the second floor of the Arrivals Building of the IAB, and on the entire concourse of the main Terminal of the North Terminal at Newark.

7. The Port Authority does not have the right to impose, and does not impose, restrictions on non-commercial leafleting and solicitation in airline terminal space leased to airlines. Airport-wide restrictions on commercial activity are not applicable to non-commercial activity, such as the activity which is the subject of this lawsuit. I respectfully remind the Court that United States District Judge Mary Johnson Lowe found in her July 21, 1982 Opinion and Order, at page 22 that,

> "the lengthy record in this case establishes conclusively that the disputed regulations do *not* [emphasis in original] apply to noncommercial activities of plaintiffs in any part of the airport property."

8. Members of the Port Authority police force neither patrol nor are stationed in the portions of the airline

leased areas to which the plaintiffs seek entry. Port Authority police are only required to respond to screening check points in those areas pursuant to Federal Aviation Administration Regulations.

9. The Port Authority cannot impose upon the airline lessees rules regarding what non-commercial, non-airline activity may or may not be conducted in space within each airline's control because: The airline is the lessee for that space; the airline paid for and supervised the construction of that space, in some instances; the airline is the only party who has the responsibility for conducting operations in that space, the airline is responsible for maintaining security under the Federal Aviation Administration Regulations in Parts 107, 108 and 129 of Title 14 of the Code of Federal Regulations. Pursuant to the leases with the airlines, the Port Authority only has the right to object to activity that creates conditions that are safety hazards or that interfere with operations. My deposition testimony and the deposition testimony of various airline witnesses corroborate the exercise of such control by the airlines.

10. I am informed by counsel that the Port Authority airport terminals have been compared by plaintiffs to city streets, parks and public squares. The Port Authority airport terminals are completely dissimilar to city streets, parks and public squares, because unlike city streets they are devoted to the single purpose of facilitating air travel. This purpose is reflected in the airport terminals' financing, planning, conditions of congestion, creation of "captive audiences", isolation from the surrounding communities and virtually unique security problems.

11. The only purpose of all three of the Port Authority airports is the facilitation of air passenger and air cargo transportation.

12. The sole purpose of the passenger terminals at the Port Authority airports that are the subject of this lawsuit is the facilitation of passenger air travel. All planning and operational decisions that are made with regard to the Port Authority airport terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft. Decisions regarding the number and location of boarding gates, placement of ticket counters, providing passenger information, the number and types of consumer services all have as their goal assisting the air passenger to reach his or her destination as quickly as possible, and to make any time spent in the terminal as convenient and pleasant as possible.

13. Port Authority airports differ from streets and parks in that the airports' operations are financed by user fees, not by the general tax revenues of any state, county or city. These user fees are rentals paid by airline tenants (such as the airline defendants in this suit), landing, terminal and ramp gate fees paid by individual and corporations for use of the airports by itinerant and lessee aircraft, fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by air passengers (such as parking lot fees).

14. The Port Authority, which has no power to levy or collect taxes, and whose financial obligations are not

guaranteed by any other government body, must operate as a self-sustaining enterprise. The Port Authority must raise the funds necessary for the improvement, construction or acquisition of its facilities by reliance upon its reserve funds and its future revenues. In the past, such moneys have been supplemented in certain cases by federal and state contributions.

15. The Port Authority raises funds for capital improvements through the sale of consolidated revenue bonds. However, airport revenues are sufficient to cover all airport operating and capital expenses.

16. The limited portion of airport capital funds received from the federal government are grant monies derived from airport user fees pursuant to the relevant statutes in Titles 26 and 49 of the United States Code.

17. The pedestrian circulation and congestion characteristics of the Port Authority airports' passenger terminals also reflect the differences between city streets and the Port Authority airports. The airport terminal concourses are designed to facilitate the movement of departing passengers and their baggage into the airport terminals, to their ticketing/check-in facilities, and to their boarding gates and onto their airplanes; similarly, airports are designed to facilitate the movement of arriving air passengers out of their airplanes, into the terminals, to the baggage claim area and onto ground transportation vehicles. Concourses are designed to permit the quickest possible movement from the point of the passenger's arrival at the airport, by ground or air, to his or her point of departure. A pedestrian delay of minutes or even seconds can cause a traveler to incur substantial

loss in travel time, and possibly additional costs, because of a missed plane.

18. Many of the concourses in the existing terminals at the Port Authority airports were designed before the development and use of wide body aircraft, and those terminals are "bursting at the seams" during peak hours to handle the enormous surges of passengers from these huge aircraft.

19. Pedestrian routes in airports are heavily congested during peak travel hours, and the timing and duration of these peak periods are subject to considerable fluctuation. Generally speaking, the peak usage periods at Kennedy are 3:00 to 10 P.M.; the peak usage periods at LaGuardia are 7:00 to 10:00 A.M. and 3:00 to 9:00 P.M.; and the peak usage periods at Newark are 8:00 A.M. to 10:00 A.M. and 5:00 to 10:00 P.M. These peak periods are subject to being lengthened and changed because of weather conditions, mechanical difficulties in aircraft, airline hubbing activities and other factors.

20. Airport pedestrian congestion is the Port Authority airports' single greatest problem. The introduction of, and increase in use of, large capacity aircraft since the construction of the terminals at the Port Authority airports has resulted in a continuing and growing pedestrian congestion problem. For instance, in 1985, a Port Authority's staff evaluation analysis of expansion plans for the IAB indicated that the existing IAB lobby serves as a meeter/greeter waiting area and an information center. It also provides access to a variety of transportation modes. This creates excessive crossflows, confusion, and

crowding to the point that the operation is severely hindered during the peak hours. The current IAB Interim Improvement Program would alleviate some of the problems noted above but the existing 20,000 square foot lobby could never provide the level of service which would be provided by the 48,000 square foot lobby recommended for the projected 50% increase in the peak hour occupancy.

21. Due to landside congestion, the Port Authority adopted a "perimeter" rule at La Guardia, its smallest airport. Briefly, the perimeter rule cuts down on landside congestion by prohibiting the congestion inducing long haul passenger aircraft from using La Guardia airport. Generally speaking, the rule prohibits any flight to or from La Guardia whose proximate origin or destination is more than 1500 miles from LaGuardia. (The nature and purpose of the perimeter rule is set forth in detail in *Western Airlines, Inc. v. Port Authority*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *pet. for cert. filed sub nom, Delta Air Lines, Inc. v. Port Authority*, No. 87-333.)

22. Airport congestion has caused the Port Authority to plan extensive capital alterations to its airports. The sole purpose of these improvements, which will require the expenditure of a projected $2.4 billion for the period of 1987-1991, and additional monies thereafter, is to reduce landside congestion and facilitate pedestrian movement within the passenger terminals at the Port Authority airports.

23. Another characteristic of the Port Authority airport terminals which distinguish them from city streets

and parks resulting from their purpose of facilitating air transportation is that they contain "captive audiences" at virtually every location where people can congregate. Persons waiting for an airplane to arrive or leave normally remain in a specific waiting area. Similarly, persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction.

24. The Port Authority airport terminals are also dissimilar to city streets, parks and public squares because each of the Port Authority's airports is isolated from the surrounding community by highways. Consequently, persons either use the airport concourses as thoroughfares to or from destinations within the surrounding communities, nor use them as gathering places for community activities. Virtually all of the persons in the airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes. According to the Port Authority surveys, air travel passengers comprise 80% of the persons in the airport terminals, "meeters and greeters" comprise 15%, and employees of airlines and other airport related businesses comprise 5%.

25. A final additional characteristic of the Port Authority airports that makes them dissimilar to public streets or parks is the airports' unique security concerns. The history of skyjacking and other forms of terrorism at

airports, including the 1975 bombing at La Guardia Airport which caused the death of 11 people and injured 72 people, necessitates the maintenance of security precautions found in few places in our society, including the mandatory screening of air passengers, as required by Parts 107, 108, 108 and 129 of Title 14 of the Code of Federal Regulations. Parts 108 and 129 were amended December 21, 1987 to increase security requirements by further limiting access to boarding gate areas, as set forth at 52 Fed. Reg. 48508 (December 22, 1987). I anticipate further security requirements to be imposed by the federal Aviation Administration.

26. Pursuant to the agreement entered into with plaintiffs to grant them access, pending the conclusion of this litigation, to the terminals controlled by the Port Authority, the Port Authority currently permits leafleting and solicitation in certain areas of the terminals controlled by the Port Authority subject to time, place and manner restrictions.

27. The time, place and manner restrictions applicable to the Port Authority controlled terminals in effect presently and for the duration of this litigation have been extended to everyone, and no person or group has challenged these rules as invalid. I have reviewed plaintiffs' submission in support of their motion and find no claim or evidence challenging the validity of the time, place and manner restrictions presently applicable to Port Authority controlled space.

28. The Port Authority's time, place and manner restrictions in effect pursuant to the interim agreement with plaintiffs give those engaged in the non-commercial

distribution of literature and solicitation of money access to the greatest number of persons patronizing the public areas controlled by the Port Authority at these airports. For example, at the Arrivals Building of the IAB, First Amendment activities are permitted on the second floor through which area most airport visitors traverse to view the Flight Board and obtain information on the arriving and departing flights. This area also leads to the restaurants, snack bars, gift shops, observation decks and duty free areas. At the CTB of LaGuardia, First Amendment activities are permitted at the main lobby of the CTB where passengers and visitors must enter in order to use all airport facilities. Finally, the entire concourse of the main building of the North Terminal at Newark is open to leafleting and solicitation.

29. The only areas from which the First Amendment activities are excluded under the interim agreement are those congested areas where First Amendment activities would unquestionably interfere with airport operations. Such areas include check-in and ticketing areas where lines of departing passengers form, baggage carousels and arrival areas, where pedestrian flow would be hampered, waiting areas that contain "captive audiences", and corridor areas where interference with pedestrian flow would present safety and operational problems.

30. I have reviewed the part A of the Civil Rule 3(g) Statement of the Defendant Superintendent of Port Authority Police and state that it is correct.

/s/ Morris Sloane
MORRIS SLOANE

Sworn to before me, this
19th day of January, 1988

/s/ Arnold D. Kolikoff
NOTARY PUBLIC

ARNOLD D. KOLIKOFF
Notary Public, State of New York
No. 24-4834667
Qualified in Kings County
Commission Expires June 30, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., Plaintiffs, -against- WALTER LEE, et al., Defendants.	75 Civ. 5388 (MJL) AFFIDAVIT OF ANTHONY A. SANTANGELO IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK :
ss:
COUNTY OF NEW YORK :

ANTHONY A. SANTANGELO, being sworn, deposes and says:

1. I am House counsel for Lufthansa German Airlines ("Lufthansa") for North and Central America and have held that position since March 22, 1971. I am fully familiar with the facts set forth herein. I make this affidavit in opposition to the motion for summary judgment made by plaintiffs.

2. Lufthansa leases its premises in the east wing building at JFK International Airport from the Port Authority of New York and New Jersey (the "Port Authority"). The east wing and west wing building are buildings connected to the International Arrivals Building ("IAB"). Lufthansa's premises consist of passenger

and baggage check-in areas, a passengers lounge and waiting areas, ticket counters and private offices. In addition, Lufthansa has rights, as tenants-in-common with other foreign air carriers, to certain concourse areas, hallways and departure gates.

3. When Lufthansa leased these premises from the Port Authority, the premises were unfinished. Lufthansa spent substantial sums of its own money for the construction of counters, stairways, escalators, conveyors and other appurtenances in order to make the premises suitable for Lufthansa's operations. In addition, Lufthansa is responsible for the overall operation and management of its premises at JFK, including all maintenance, renovation and repair. Lufthansa pays for all utilities and all other services provided to its premises.

4. The aforesaid rights and obligations of Lufthansa are set forth in a lengthy lease negotiated by Lufthansa with the Port Authority. The lease provides that Lufthansa is entitled to the *exclusive* use and possession of the leased premises. Lufthansa is obligated to pay rent and to pay for all services performed by the Port Authority in the leased premises.

5. Lufthansa has a policy which prohibits anyone, including plaintiffs, from distributing literature or soliciting contributions in Lufthansa's premises where such activities would be disruptive of Lufthansa's business operations. Lufthansa operates its facility for the use of its passengers, customers and business invitees and in furtherance of its business of supplying international air transportation services. The use of Lufthansa's premises

by plaintiffs to distribute literature and solicit contributions would substantially impair its use by Lufthansa and its passengers for air transportation purposes, the use for which Lufthansa has expended and continues to expend substantial sums of its own money.

WHEREFORE, it is respectfully requested that the plaintiffs' motion for summary judgment be denied in its entirety.

/s/ Anthony Santangelo
ANTHONY A. SANTANGELO
Sworn to before me this 16th day of January, 1988

/s/ Alan A. D'Ambrosio
NOTARY PUBLIC

ALAN A. D'AMBROSIO
all illegible
April 30, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., Plaintiffs, vs. WALTER LEE, et al., Defendants.	75 Civ. 5388 (MJL) AFFIDAVIT OF WILLIAM H. BOICE

STATE OF GEORGIA)
)
COUNTY OF FULTON)

WILLIAM H. BOICE, being duly sworn, deposes and says:

1. I am a member of Kilpatrick & Cody, attorneys for certain defendants herein. I make this Affidavit in support of the Memorandum of Air Canada Group Defendants in Opposition to Motion for Summary Judgment, which opposes the Motion of the Plaintiffs for Summary Judgment dated November 11, 1987.

2. Plaintiffs' motion for summary judgment asserts that the Plaintiffs have demonstrated that there are no disputed issues of any material fact and that they are entitled to judgment as a matter of law on their claim that

the policies of airlines prohibiting solicitation of contributions or distribution of literature within the airlines' terminals at JFK, La Guardia, and Newark International Airports are unconstitutional.

For the reasons set forth in the accompanying Memorandum of Air Canada Group Defendants in Opposition to Motion for Summary Judgment, the court should deny Plaintiffs' motion. Analysis of the character of the relevant forums and bases for the restrictions applied by each airline demonstrates that each airline's terminal at each airport is a nonpublic forum and, further, that each airline's policy is a reasonable, viewpoint-neutral restriction that is not prohibited by the First Amendment.

Attached hereto as Exhibit A is a true and correct copy of the Memorandum of Air Canada Group Defendants in Opposition to Motion for Summary Judgment.

Attached hereto as Exhibit B is a true and correct copy of the Air Canada Group Defendants' Response to Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment.

Attached hereto as Exhibit C is a true and correct copy of the Certificate of Service for Air Canada Group Defendants' Response to Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment and Memorandum of Air Canada Group Defendants in Opposition to Motion for Summary judgment dated January 18, 1988.

/s/ William H. Boice
William H. Boice

Sworn to and subscribed
before me this 18th day
of January, 1988, and
notarized by me on said
date.

/s/ Sarah Howard
Notary Public

My commission expires:

Notary Public, Georgia State at Large
My Commission Expires November 7, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*, Plaintiffs, – against – WALTER LEE, *et al.*, Defendants.	75 Civ. 5388 (MJL) AIR CANADA GROUP DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to S.D.N.Y. Local Rule 3(g), the Air Canada Group defendants respond to the plaintiffs' statement of facts in support of their motion for summary judgment, as follows:

I. GENERAL FACTS

1.

The factual assertions contained in paragraph 1 are denied. Plaintiffs have offered no proof to support these assertions.

2.

The factual assertions contained in paragraph 2 are denied. Plaintiffs have offered no proof to support these assertions.

* * *

otherwise competent to give the opinion testimony contained in paragraph 69 regarding whether the concourse level at Terminal B has "*spacious* corridors."

70.

The factual assertions contained in paragraph 70 are admitted.

E. First Amendment Activities Presently Permitted and Prohibited in the Terminals

71.

The factual assertions contained in paragraph 71 are admitted.

72.

The factual assertion contained in paragraph 72 is admitted, on the basis of the interim settlement agreement with Eastern Airlines, but only with respect to the plaintiffs' claims against Eastern Airlines. The factual assertion contained in paragraph 72 is inadmissible for all other purposes.

73.

The factual assertions contained in paragraph 73 are admitted.

74.

The factual assertions contained in paragraph 74 are admitted.

75.

The factual assertions contained in paragraph 75 are admitted.

76.

In response to the factual assertions contained in paragraph 76, the Air Canada Group defendants state that each individual airline defendant had adopted its own policy with respect to the matters described in paragraph 76, although plaintiffs' description of the airlines' policy is generally an accurate description of each individual airline's policy.

F. Facts Pertaining to Public Access to the Airport Terminals

77.

The factual assertions contained in paragraph 77 are denied, as stated.

78.

The factual assertion contained in paragraph 78 are admitted.

79.

The factual assertion contained in paragraph 79 is admitted.

80.

The factual assertion contained in paragraph 80 is admitted.

* * *

99.

The factual assertion contained in paragraph 99 is admitted, except that the Air Canada Group defendants note that American Airlines paid the construction cost of its terminal facilities at La Guardia and JFK.

100.

The factual assertion contained in paragraph 100 is denied on the grounds that, as stated, it is both vague and incomplete.

101.

The factual assertion contained in paragraph 101 is denied on the grounds that, as stated, it is both vague and incomplete.

102.

The factual assertion contained in paragraph 102 is admitted.

103.

The factual assertion contained in paragraph 103 is denied on the grounds that, as stated, it is both vague and incomplete.

104.

The factual assertion contained in paragraph 104 is denied on the grounds that, as stated, it is both vague and incomplete.

* * *

125.

The factual assertions contained in paragraph 125 are admitted.

126.

The factual assertions contained in paragraph 126 are admitted.

127.

The factual assertions contained in paragraph 127 are denied on the grounds that, as stated, they are incomplete. The Air Canada Group defendants note that although the Port Authority provides certain services to the airlines under the lease agreements, the airlines nevertheless pay the Port Authority for these services.

128.

The factual assertions contained in paragraph 128 are denied on the grounds that, as stated, they are vague and ambiguous.

129.

The factual assertions contained in paragraph 129 are admitted.

130.

The factual assertions contained in paragraph 130 are admitted, although the Air Canada Group defendants note that these assertions are irrelevant to the issues raised in plaintiffs' motion for summary judgment.

131.

The factual assertions contained in paragraph 131 are denied on the ground that, as stated, they are incomplete. The Air Canada Group defendants note that although the Port Authority provides services to the airlines at Newark International Airport, pursuant to the lease agreements between the Port Authority and the airlines, the airlines pay the Port Authority for these services.

132.

The factual assertions contained in paragraph 132 are admitted.

133.

The factual assertions contained in paragraph 133 are admitted.

134.

The factual assertions contained in paragraph 134 are admitted.

135.

The factual assertions contained in paragraph 135 are admitted.

* * *

150.

The factual assertions contained in paragraph 150 are admitted.

151.

The factual assertions contained in paragraph 151 are admitted.

Respectfully submitted,

KILPATRICK & CODY

By: /s/ William H. Boice
William H. Boice
Marc K. Ritzmann

Members of the Firm

3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

NITKIN, ALKALAY, HANDLER & ROBBINS

122 East 42nd Street
New York, New York 10168

Attorneys for Air Canada Group Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., : 75 Civ. 5388 (MJL)

Plaintiffs, : AFFIDAVIT

– against – :

WALTER LEE, et al., :

Defendants. :

---X

STATE OF NEW YORK)
: ss.
COUNTY OF QUEENS)

LEIF ANDERSSON, being duly sworn, deposes and says:

1. I am the station manager at John F. Kennedy International Airport ("JFK") for defendant Scandinavian Airlines System ("SAS"). I make this affidavit on behalf of SAS, Air India, Iberia Airlines of Spain, Icelandair, Irish International Airlines, Japan Airlines and Varig Brazilian Airlines (the "Air India Defendants") in opposition to plaintiffs' motion for summary judgment, or in the alternative, for a preliminary injunction.

2. SAS is a foreign air carrier engaged in the business of providing commercial air transportation between the United States and various points outside the United States. SAS is a consortium of the national of Norway,

Sweden and Denmark. SAS, together with other Air India Defendants, all lease space at JFK's International Arrivals Building ("IAB").

3. I have been station manager for SAS at JFK since September, 1981. In that capacity, I have become fully familiar with the IAB.

4. The Arrivals Building (Building No. 50) is under Port Authority control and is not leased to the Air India Defendants or any other IAB tenants. As its name implies, it is used to process arriving international passengers, who, after retrieving their luggage and clearing U.S. Immigration and Customs, exit into a central hallway on the first floor of the Arrivals Building.

5. The second floor of the Arrivals Building contains a mezzanine/lobby area, which includes a number of commercial outlets. This area is not leased to or under the control of the Air India Defendants.

6. The Air India Defendants and certain other international air carriers lease space from the Port Authority in the East and West wing Buildings in the IAB complex. Some of this space is leased exclusively and individually by each foreign air carrier. Each of the Air India Defendants leases its own space on the first floor of one of the Wing Buildings for reservations, ticket sales and passenger check-in, among other things. Additional exclusively-leased space is found on the second floor of the Wing Buildings. The Air India Defendants use this space for, among other things, passenger lounges open only to their particular customers.

7. The Air India Defendants are also tenants-in-common in each respective Wing Buildings' second-floor L-shaped "finger" corridors for use by passengers on departing international flights. These finger corridors are not general circulation areas, but have only one way pedestrian traffic. The finger corridors do not interconnect with any other parts of the airport. Thus, after checking-in at a particular IAB airline's facilities on the first floor, an international passenger ascends to the second floor finger areas of one of the two Wing Buildings. There the passenger will remain until his plane is called and then proceed down one of the two fingers of an L-shaped corridor, pass through security and board his plane.

8. The second floor finger corridors controlled by IAB tenants are for the use of departing international passengers. Because arriving international passengers must clear immigration and customs procedures, they are channeled through the central Arrivals Building and thus would have no occasion to use the finger corridors of the East and West Wing Buildings. The East and West Wing second-floor finger corridors are one-way, closed-end conduits for departing international passengers.

9. Having checked in their baggage, international passengers who are awaiting the departure of their flight in a second floor Wing Building finger corridor are essentially "captives" of that area. Until their flight is called, these passengers have nowhere else to go. As a practical matter, the Air India defendants' passengers are restricted to a limited area and cannot depart at will.

10. The few commercial establishments which line the Wing Buildings' finger corridors are designed for and

cater to departing passengers. Based upon my experience as a New York resident, the prices charged by these airport establishments are generally higher than prices charged by establishments located elsewhere.

/s/ Leif Andersson
Leif Andersson

Sworn to before me this
19th day of January, 1988

/s/ Dorothy L. Figueroa
Notary Public

DOROTHY L. FIGUEROA
Notary Public, State of New York
No. 31-4873537
Qualified in New York County
Commission Expires Oct. 14, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

INTERNATIONAL SOCIETY
FOR KRISHNA CONSCIOUSNESS,
INC., et al., 75 Civ. 5388

Plaintiff,

-against-

WALTER LEE, etc., et al.,

Defendants.

----------x

March 25, 1988
11:10 a.m.

Before:

MICHAEL H. DOLINGER,

Magistrate

APPEARANCES

DAVID M. LIBERMAN,
Attorney for plaintiff

ARTHUR BERG,
-and-
PHILIP A. MAURER,
Attorneys for defendant Port Authority

WILLIAM H. BOICE,
Attorney for defendant Air Canada Group

PHILIP DOUGLAS,
Attorney for defendant Air India

ALAN A. D'AMBROSIO
Attorney for defendant Lufthansa German Airlines

[p. 2] THE MAGISTRATE: I asked all you folks here for a couple of related reasons. As we all know, there has been a process underway over a period of what seems like many months, to brief summary judgment motions on I think all the remaining legal issues in the case.

I recently received from the plaintiffs some reply papers and a letter which indicated that the papers were addressed solely to the Port Authority's position in the case. That as for the other matters originally in the case, there had been what I think was referred to as an agreement in principle to settle the case. Accordingly, the plaintiffs were not going to address any issues that might have been raised with respect to the airline defendants.

Now, the phrase agreement in principle sounded vaguely familiar and although I resisted the temptation to go back to earlier correspondence in this case, I believe my memory is correct that at various phases in this superannuated litigation, I had been told by counsel for various parties that agreements had been either reached or about to be reached or might well be reached in the near future and for that reasons various things ought to be put on hold.

Typically these involved continuation of [p. 3] discovery, in some cases I believe responding to motions.

Now, as we're all aware, the Second Circuit had in its opinion on this case said not only is this an old case but it ought to be given top priority. Based upon past performance it seemed to me that a representation about an

agreement in principle is a basis for in effect putting on the shelf a motion and indeed the major portion of this lawsuit was altogether unsatisfactory.

Therefore, insofar as we're talking about the airline defendants, I wanted to get a clearer understanding of what the dickens is going on. Whether there is an agreement, if so is it going to be reduced to writing.

Whether the plaintiffs intend to dismiss or discontinue, be it with or without prejudice, as to those defendants; if so, when.

If all this is as vague as it seemed from the letter whether the plaintiffs intended to put in reply papers with respect to the airline defendants since we're not going to allow this to smolder away.

Since the plaintiffs were the ones who advised me of this, although in somewhat vague terms, [p. 4] why don't I hear from them as to what is going on.

MR. LIBERMAN: I'm the plaintiff but I think Mr. Boice can answer that.

MR. BOICE: I have the agreement in my briefcase.

We do have an agreement between all of the airline defendants. I have with as many airline defendants as we have, 24, 25, 26, I'm not exactly sure as to exactly how many we have.

I have authority from all of my clients, Mr. Douglas has authority from all of his clients. Everyone we have talked to has agreed to the agreement. It is all ready to be signed off on and it's going to be signed off on by counsel for all the parties.

The agreement provides that the claims against the airline defendants will be dismissed with prejudice. There is a proviso in the agreement that should the airline defendants be found to be state actors in a subsequent unrelated action against the airlines and the airline space be found to be an appropriate public forum so that a group unrelated to the Krishnas is allowed access and subject to reasonable time, place and manner restrictions, the agreement we have with dismissal with prejudice would not preclude of the Krishnas from participating in any [p. 5] associate subject to the same regulations that the airlines were to have at that point adopted. So, it's with prejudice with a proviso that it does not exclude them.

So, it's leaving an opener at the end if something should happen with unrelated litigation down the road someplace.

The agreement is ready to be signed off, I have copies of the agreement. We need an exhibit prepared, two exhibits prepared to it and we just need to circulate it around among all the parties. It should be ready to be dismissed 30 days after it is signed off and it should be signed within a couple of weeks.

THE MAGISTRATE: Well, that takes care of item number one.

Item number two is of course the balance of the case, which is the motion for summary judgment vis-a-vis the Port Authority.

I wanted to be sure before I actually got to the phase of sitting and reading all the cases and starting to write

something, that this really was serious. That is what I take to be the nub of the dispute, that is the unwillingness of the Port [p. 6] Authority to agree to continue whatever it is that it has been doing since about 1975.

MR. BERG: 1975.

THE MAGISTRATE: It was so clear that in fact we needed to answer some ultimate questions in this lawsuit, like the merits.

I gather as much from the papers but wanted to be sure that I wasn't misapprehending and that I didn't end up putting in a fair amount of work only to be told after all of this that in fact the parties really were going to settle the case.

MR. BERG: Your Honor, my name is Arthur Berg, representing the Port Authority.

The Port Authority's position is that an airport is not a public forum. The Port Authority board has recently adopted a resolution which I'm going to hand up to you clarifying that position.

We have attempted to workout a settlement with the Krishnas along the lines that we have no immediate plans of changing the status quo. Based on that I think they have withdrawn their motion for preliminary injunction, their latest papers.

We are currently in litigation in the New Jersey District Court with USA Today invotving whether [p. 7] they have the right to place news racks in airport terminals.

What we have proposed to the Krishnas is that this case be held in abeyance pending the outcome of that

case which is scheduled for trial on May 28th. That we await a decision on the public forum issue. That after such a decision is made, then they could take whatever action they desire in this case.

So, we have proposed that this case be held in abeyance for the moment may.

THE MAGISTRATE: I take that it your proposal is not that the outcome of this case be governed by the outcome in New Jersey but merely that notwithstanding briefing, that in effect the court basically await for the outcome of New Jersey since I take it there is nothing at this point for the parties to do beyond argue the motion, which I am incidentally prepared to hear argument on today.

MR. BERG: It was my understanding that this was just a pretrial conference; I was notified by the plaintiffs to that effect. So, we weren't really prepared for argument today. I haven't reviewed their latest paper in detail to give argument today.

THE MAGISTRATE: In any event, I take the [p. 8] the thrust of what you're saying really isn't that the parties should not do something but rather the court shouldn't do anything until the trial in New Jersey and at that point what?

MR. BERG: I was actually proposing that we envision that case will be tried and will be appealed to the Third Circuit and probably the losing side will undoubtedly seek Supreme Court review.

The Supreme Court has indicate that they are interested in this issue, the recent Jews for Jesus case, they

didn't decide the issue because they found the ordinance vague and overly broad but they have indicated that they would hear a future case.

So, the proposal was to hold this case in abeyance while the case goes ahead in New Jersey.

THE MAGISTRATE: By the way, is the New Jersey case limited to Newark Airport or is there something else involved?

MR. BERG: It's limited to Newark Airport.

THE MAGISTRATE: So that assuming for the moment that the analysis of public forum, number one; number two, the analysis of assuming that you're correct that it's not a public forum, the reasonableness turns on a fact intensive inquiry as to [p. 9] the particular area involved. The best that you could say for the New Jersey case is that it would shed some light on the Newark part of this lawsuit but would shed little, if any, light on the JFK/LaGuardia aspect or am I wrong about that?

MR. BERG: I believe that if the airports are public forums, that both the Port Authority and the Krishnas do not object to the present arrangement that has been made. So, I don't know that reasonableness is really involved here.

THE MAGISTRATE: But I take it your position, as least as I have read your papers, is that it is not a public forum and that therefore the standard is reasonableness.

If that is correct, and I take it the standard of reasonableness really turns to factual inquiry as to the particular place that one is talking about, that therefore if you're legally correct in your analysis in this case, the

New Jersey case really wouldn't shed much light on two-thirds of this lawsuit.

MR. BERG: Well, we believe that if it's not a public forum, that it's reasonable to have a complete ban on the type of activity –

THE MAGISTRATE: I understand that but [p. 10] doesn't the question of reasonableness turn on the particular characteristics of the place one is talking about, that is putting aside that all of the venues that are being litigated over here are all airports, they may in terms of their layout, in terms of crowd flow and the like, differ in some ways that might be significant for a reasonableness argument?

MR. BERG: I think that the airports are virtually identical in the congestion problems which they have. They are operated as a single unit to serve the metropolitan area. The amount of passengers at each airport is quite similar. I really don't think that there is any great distinction between Newark Airport and Kennedy and LaGuardia.

THE MAGISTRATE: Let me ask you this: I wasn't entirely clear from your papers, are you, although I understand that the plaintiff is the moving party, are you in fact seeking summary judgment on this question of public versus A, on the question of public forums versus nonpublic forums and B, on the question of assuming you're correct about that, that the complete ban or a complete ban would be reasonable?

MR. BERG: Under the new regulations, let me clarify, it's a complete ban in the interior areas. [p. 11] But

they would, the new regulations permits the type of activity on the sidewalks outside the terminals. So, there is not a complete ban on the airport, it's just on interior areas.

THE MAGISTRATE: Now, you say that this is a product of new regulations?

MR. BERG: That is correct.

THE MAGISTRATE: Are these regulations part of the briefing in this case?

MR. BERG: No, they haven't been because the regulations were adopted after our brief was filed.

THE MAGISTRATE: And is that separate and apart from the document you just handed me or is that it?

MR. BERG: That is the document I just handed you.

THE MAGISTRATE: Under the circumstances how can the court adjudicate this matter if there are factual matters including something as crucial as what the Port Authority is currently doing, without further papers to create a record?

MR. BERG: I would agree that further papers would be appropriate.

THE MAGISTRATE: Why don't I hear from the [p. 12] plaintiff the current state of the record and what they propose at this point.

MR. LIBERMAN: Well, I'm David Liberman, Your Honor.

I have just found out about this a few days ago myself, this new regulation. I don't really think it changes

anything because the Port, in their opposing papers, made it very clear what their policy was. That is that the airport terminals are a nonforum. That their policy is to exclude all well, to exclude the distribution of literature and solicitation of donations in the general circulation areas controlled by the Port. So, I don't think this regulation alters the Port's policy that they have maintained and asserted in their opposing papers.

THE MAGISTRATE: Let me ask this: The new regulation allows this sort of activity on sidewalks, are these the sidewalks immediately adjacent to the terminals?

MR. BERG: Yes.

THE MAGISTRATE: Okay, then why, for first amendment forum analysis, why is it not pertinent to look at the entire terminal area, that is the building and the sidewalk right next to the building as part of [p. 13] the analysis and not characterize the Port Authority's regulations as a time, place and manner restriction.

That is we won't prohibit you from doing anything on our property, we're simply going to designate one particular portion of it, the sidewalk area as opposed to the within building area as the place in which to do it. In which case you then are faced by a time, place, manner restriction which is another issue entirely from what you're litigating.

MR. LIBERMAN: We would – I think the public forum airport cases all specifically talk about the interior general circulation terminals.

THE MAGISTRATE: More to the point, do they address of the question whether allowing this activity on

the immediate adjacent sidewalk does or does not constitute a time, place and manner restriction for purposes of access to the airports?

MR. LIBERMAN: I don't think you could really see it in terms of the – I think the sidewalks are a distinct feature of the airports.

THE MAGISTRATE: Apart from your thought on the matter, my question is a little more precise from that. Do the cases address the issue?

MR. LIBERMAN: Not that I'm aware of – I [p. 14] know that that issue has been involved in some decisions in California but those cases struck the regulation down as overly broad. Where there was restriction at LAX only on the sidewalk, and I believe even the Jews for Jesus case may have contained that component.

But because the regulations were facially unconstitutional, it never reached the question and there is no case that I'm aware of that has viewed the airports in that way and distinguished particular components, streets, sidewalks as opposed to the interior facilities.

THE MAGISTRATE: The question I guess I have about this is whether or not if what we're now faced with is new set of regulations that at least arguably would now be characterized as time, place, manner restrictions, whether we're talking really about a different lawsuit.

You will recall of course that, I wouldn't say early in this case but early in my involvement in the case, the plaintiffs made very clear that their challenge in this lawsuit was going to be limited to attack on the absolute

ban imposed by the defendants on any form of such activity at the airports. This was in [p. 15] conjunction with a fight over the relevance of certain discovery that defendants were seeking from plaintiffs. I think the representations were quite clear on the point.

If in fact the court were to conclude, let me say I'm speaking entirely hypothetically, but if the court were to conclude that what we face now under these new set of regulations is in fact a time, place, manner restriction, does it not appear then that the remaining claim in the case, that is against the Port Authority, goes out the window because in fact there is not an absolute ban? Accordingly, you're left to such legal devices as you will take to challenge the new policy.

MR. LIBERMAN: I would, of course this is my opinion, I would contest that characterization of distinguishing the exterior sidewalks from the internal general circulation areas.

We would continue to emphasize our right of access to the entire area as opposed to the exterior sidewalks which could very well pose more of a time, place and manner problem in terms of congestion and traffic and safety concerns than the internal area.

THE MAGISTRATE: I understand that you would [p. 16] challenge the regulation. But my question is whether that is a challenge that you have in effect agreed is not within of the four corners of or the scope of your lawsuit at an earlier time, in order to gain the advantage of an order of precluding certain discovery and that therefore it is incumbent upon you, if you wish to challenge these regulations, to bring another lawsuit?

MR. LIBERMAN: Obviously if the court did interpret the new development in that way we would have little choice, we would have to go back to the drawing board and determine what we were going to do at that point.

I do believe though, that our position would remain that there is a distinction. That the sidewalks are a separate forum in and of themselves from the interior public circulation areas that are controlled by the Port Authority. We would want to litigate that issue of whether what we would do at that point is litigate the issue of whether you can distinguish or whether these are two separate forums and we would be in here for another several years determining whether the sidewalks are a separate forum from the internal areas.

I would like to add that I believe that Mr. [p. 17] Berg's proposal is to the court, because I believe that having gone over the Port Authority papers, that there is no genuine issue of material facts left on the public forum question. We will concede their public forum facts excluding representations about congestion and a captive audience and where people go and how many people go to the airport. Because there is no factual support for those allegations and they are irrelevant to the public forum. Those are of time, place and manner concerns whether it's congestion or this is a seating area I think that –

THE MAGISTRATE: Basically it would be fair to say and I'm not trying to arbitrarily define you out of court but would it be fair to say that all you are seeking at this point in your lawsuit is in effect a declaration that

the airport terminals or some aspects of the airport terminals are in fact public forums.

MR. LIBERMAN: We're seeking summary judgment on the public forum question regarding the Port Authority controlled areas.

THE MAGISTRATE: I understand you're doing that but I'm still trying to get a real handle on the ultimate issues in this case. In other words, if you were to win that what is your relief? Do you enter [p. 18] into a declaratory –

MR. LIBERMAN: I think at that point that would be a final judgment. That's the law and the Port Authority can't pass any regulations or enforce any regulations that would in effect contravene that ruling. That would be the law and that would be the end of this case.

THE MAGISTRATE: Simply that these terminals are a public forum?

MR. LIBERMAN: That the general circulation areas that have been specifically defined, I believe that was one of the major objects of discovery and I think we have done that. That's why I say as to those areas we'll concede the Port Authority's allegations regarding how many shops or how many restaurants may be located in those areas. Therefore, I don't see that there is anything else, there is no triable issue fact left on the public forum question, I think in light of the Port Authority's policy as expressed in their briefs, I think the case is properly decided.

THE MAGISTRATE: So then you would not be arguing, would you, assuming that the court found that

these areas are not a public forum, you would not be arguing the reasonableness of an outright ban?

[p. 19] MR. LIBERMAN: We would argue then that an outright ban would be unreasonable. But frankly, the cases are very clear on that. It's a very low standard burden that's placed upon the regulating agency and that means public forum you're in and nonforum you're out. Totally excluded would probably, although I wouldn't concede that on the record but I'm just saying in frankness to the court, that I think in light of the way the cases have gone that a total exclusion in the airport would probably be a reasonable regulation in a nonforum.

THE MAGISTRATE: Would you agree that by your earlier representation to the court that you were not going to contest time, place and manner restrictions, that in fact that issue of reasonableness would be beyond the scope of this lawsuit?

MR. LIBERMAN: We believe that time, place and manner is beyond the scope of this lawsuit. Once the public forum issue is resolved then this case is over. I think that's consistent with what we've said all along.

If the Port Authority maintains their present policy then we probably wouldn't be back. But if they changed the rules promulgated for restrictive [p. 20] provisions because one of the factors in the settlement with the airlines, and an important factor, is the planned expansion that we discovered recently in preparing our motion for summary judgment. This major billion dollar capital expansion plan that in effect is going to provide facilities in Port Authority controlled areas where the leased areas are no longer necessary. So, why litigate it, why waste

everybody's time and that would also be a potential issue.

But until those facilities are built and we actually have a chance to see what kind of access could be reasonably accommodated, those areas that might be of a potential dispute somewhere in the future – but I think of the public forum question is hotly contested right now between the parties.

I'm comfortable with this court ruling on that. I'm not comfortable waiting to see what the Third Circuit does. I would rather take my chances in this jurisdiction. But if the court would feel that that might shed some light on that issue and would like to wait to see what the District Court in New Jersey did on this matter, that would be beyond my control. I would just as soon go ahead because I do think that the case is that ripe for summary adjudication.

[p. 21] THE MAGISTRATE: I happen to agree with you. I don't see any reason why the court in New Jersey has to grind its wheels and then the Third Circuit, particularly in view of the age of this case. It seems to me this case ought to proceed.

I did want to have asked you one other thing and I think you may have actually answered it already. I had gotten a sense from your papers that you are almost asking the court to order the Port Authority to continue the present policy. I take it that's really not the case?

MR. LIBERMAN: Well, in light of Mr. Berg's representation on the record before the court that pending the outcome of this case they do not intend to change

their poiicy regarding current access, then I would agree, there is no need for an order at this time. Because that would be stipulated by the parties on the record.

THE MAGISTRATE: You would also agree that that is not part of the final relief that you're seeking in this lawsuit?

MR. LIBERMAN: Time, place, manner would not be part of the final relief.

What we're anticipating and is a total ban, [p. 22] not an adjustment on the time, place and manner. But Mr. Berg has already agreed to keep the status quo in place at least pending the outcome of this lawsuit.

THE MAGISTRATE: Then it seems to me where we're really left is given recent developments that Mr. Berg has pointed out, I agree with him that in some way the record is going to have to and the parties are going to have to address the significance of this for purposes of summary a judgment motion. I think I've already given you an idea of the questions that come quickly to mind about the significance of this including, among other things I have indicated, my question about in the context of an airport situation whether the sidewalks don't become part of the whole package and thus any regulation that allows activities on the sidewalks to become in effect a time, place and manner restriction with respect to the entire airport or at least the pertinent portions of the airport as well as any discussion you may have with respect to the significance of this policy for the plaintiffs' claims for relief.

It seems to me that at present the Port Authority ought to go in order first with its papers which I assume will include some form of cognizable [p. 23] specification and evidentiary form of what the present policy of Port Authority is, its basis and of course its significance for the issues that have already been briefed and that plaintiffs will then respond.

Given the superannuated nature of things here I would expect this to be done reasonably quickly. Let's say two weeks for the Port Authority and then two more weeks for the plaintiff.

If at that time either party wants oral argument or I see in the papers something that needs further elucidation, I would of course let you know. But my assumption is that should be sufficient to conclude matters here.

Is there anything else that we ought to address at this point?

MR. BERG: I think the agreement between the Krishnas and the airlines. The way I understand it presently, the Port Authority is not a signatory to that agreement. I understand from reading Rule 41 that you would need either consent of all the parties or a court order. So, I would just like to know which way they intend to proceed. I mean, at some point Port Authority would like an opportunity to, if it's going to be by court order, to comment on the agreement or to [p. 24] have its views.

THE MAGISTRATE: If my recollection is correct, Port Authority has a lot of potential authority on everything that happens in the terminals. Is it your understanding that just by virtue of whatever regulations

are or agreements are in place the Port Authority may have with the airlines or may have issued on its own, that the Port Authority needs to approve any such agreement?

MR. BERG: No, no. I'm under the Federal Rules of Civil Procedure.

THE MAGISTRATE: I understand the distinction, I'm just asking you apart from the Federal Rules is there some necessity for the Port to sign off on this under its agreements with the airlines?

MR. BERG: No.

THE MAGISTRATE: Actually if in fact the agreements have been reached, one thing I think that would be helpful to me partly just for my own understanding of what's going on, is as quickly as possible to get me a copy of the agreement between the airlines and the plaintiffs.

But as far as of Port Authority commenting on any proposals dismissal, I assume that as of the [p. 25] time that the agreement is ready for formal submission to the court, that a copy will be made available to the Port Authority. The Port Authority having noted its desire to at least be heard on the matter, the court will give the opportunity to do so.

THE MAGISTRATE: Anything else?

MR. BOICE: Your Honor, I have a copy of the settlement agreement and I'll leave it. Mr. Douglas expressed to me there are several motions that are pending before the District Court. I wouldn't think that it would be appropriate to have any of those decided with

respect to any disputes with respect to the airlines and the Krishnas at this point.

If some notice could be given to the District Court that this is the current status and that things ought to be held that in abeyance – I wouldn't want to have somebody decide that might change the parties' position. It's kind of that great unknown out there is part of the reason for a settlement.

THE MAGISTRATE: I'm just trying to think now whether the best approach would be me sending a memorandum to Judge Lowe or you writing her a letter indicating that the parties have reached agreement and will be submitting this authority shortly.

[p. 26] MR. BOICE: If you wouldn't mind, I think since you're handling the case overall and it's in agreement to you to where we are – I'll give you a copy of the agreement so that if there are any questions we'll be happy to discuss it with you.

THE MAGISTRATE: I suspect that this news will not bring great chagrin to Judge Lowe's chambers. I don't mind being the bearer of such tidings.

MR. BOICE: I wouldn't suppose that it would.

THE MAGISTRATE: Anything else?

MR. LIBERMAN: I would just like to clarify whether you would agree with the Port Authority's contention that their approval or consent is needed in the alternative a court order for us to settle out with other parties to the case?

THE MAGISTRATE: Were answers ever filed to the complaint?

MR. BOICE: Excuse me?

THE MAGISTRATE: Did the defendants ever file an answer to the complaint?

MR. BOICE: Yes.

THE MAGISTRATE: In which case, if I recall and I'm treading on slightly musty memory, that in any event a requirement that the court approve any [p. 27] dismissal, I think Rule 41 contemplates a dismissal without court approval prior to the filing of answer.

MR. BERG: That's correct. I have Rule 41.

THE MAGISTRATE: So, it's going to be of the standard stipulation with a spot on the last page for a so ordered signature by the court. If the Port Authority wishes to be heard on the matter, certainly in the ordinary course we allow parties to be heard on any matters under the sun.

MR. LIBERMAN: So, this wouldn't in effect take any longer than it might otherwise take anyway?

THE MAGISTRATE: I can't conceive that it would, no.

Anything else? Thank you all very much.

(Time noted 11:45 a.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,	75 Civ. 5388 (MJL)
Plaintiffs,	SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PRELIMINARY INJUNCTION
-against-	
WALTER LEE, etc., et al.,	
Defendants.	

COUNTY OF NEW YORK :
ss:
STATE OF NEW YORK :

MORRIS SLOANE, being duly sworn, says:

1. I am presently Director of the Aviation Operations for the Aviation Department of The Port Authority of New York and New Jersey (hereinafter after called "the Port Authority"). From December 1973 to September 1987, I was Deputy Director of the Aviation Department.

2. I submit this supplemental affidavit in opposition to plaintiffs' motion for summary judgment and a permanent injunction or, in the alternative, for a preliminary injunction prohibiting the enforcement of the policy on the distribution of literature and solicitation of money applicable to the passenger terminals controlled by the Port Authority in John F. Kennedy International Airport (hereinafter "Kennedy"), LaGuardia Airport (hereinafter

"LaGuardia"), and Newark International Airport (hereinafter "Newark"). (Hereinafter, the three airports will be collectively referred to as "the Port Authority airports".)

3. I submitted an Affidavit in Opposition to plaintiff's motion, sworn to on January 19, 1988. I respectfully refer the Court to that affidavit for a description of the relevant characteristics of the Port Authority airports.

4. Port Authority counsel have informed me that on March 25, 1988, as part of the proceedings herein, a conference was held before United States Magistrate Michael H. Dolinger in which plaintiffs' and defendants' counsel appeared. (Attached hereto as Exhibit A is a copy of the transcript of that conference.) According to counsel, during the conference Magistrate Dolinger was informed that the Port Authority had adopted new regulations relevant to this action, *see*, Transcript at 10-11; and Magistrate Dolinger requested, *inter alia*, that the Port Authority present the new regulations in evidentiary form. *See*, Transcript at 22-23.

5. The purpose of this supplemental affidavit is to present to the Court the nature and basis of the new regulations addressed by Magistrate Dolinger on March 25.

6. The new regulations are set forth in a resolution amending Chapter III of the Airport Rules and Regulations of the Port Authority. The resolution was adopted by the Committee on Operations of the Board of Commissioners of the Port Authority on February 11, 1988, and became effective on March 3, 1988, after the expiration of the period in which the Governor of New York and of New Jersey could have exercised the power to veto the

February 11 actions of the Port Authority. (The Governors' veto power is set forth at N.Y. Unconsol. L. §6417 (McKinney 1979) and N.J. Stat. Ann. §32:1-17 (West 1963).) A copy of the resolution is attached hereto as Exhibit B.

7. I understand that, as set forth in Paragraph 3 of Plaintiffs' 3(g) Statement dated November 11, 1987, and page 7 of Brief for Plaintiffs in Support of Motion dated November 11, 1987, the object of plaintiffs is to perform "sankirtan" in the Port Authority air terminals. "Sankirtan" is defined by plaintiffs as "going into public places, disseminating religious literature and soliciting funds . . . . " Plaintiff's 3(g) Statement, ¶3.

8. The regulations relevant to this action are set forth in Part B of Chapter III of the Airport Rules and Regulations, as amended. The sections of Part B which would affect the performance of sankirtan are Sections 1(b), 1(c), and 2(b). These regulations have not been, and will not be, enforced in violation of the interim agreement between the Port Authority and plaintiffs set forth in Paragraph 28 of my January 19 Affidavit.

9. (a) Part B regulates non-commercial activity at Port Authority air terminal space which are not occupied by a lessee, licensee or permittee.

(b) Section 1 is applicable to the interior areas of buildings and regulates certain conduct by a person addressed to passers-by in a continuous or repetitive manner. Section 1(b)-(c) prohibits the continuous and repetitive distribution of literature to, and solicitation of

money from, passers-by. Section 1 does not address private, one-on-one or individualized activity inside or outside an air terminal building. An effect of Sections 1(b)-(c) would be to prohibit the performance of sankirtan within air terminal buildings in space that is not occupied by a lessee, licensee or permittee. Section 1 would not prohibit sankirtan in external locations.

(c) Section 2 addresses conduct both within and without air terminal buildings. Section 2 would not prohibit sankirtan provided that such activity did not interfere with airport operations as set forth in Section 2(b).

10. The purpose of Sections 1(b)-(c) and 2(b) is to restrict activity which is inconsistent with the purpose of the Port Authority air terminals – the facilitation of air travel and which has the effects of contributing to the problem of pedestrian congestion, adding to the problems of airport maintenance, causing annoyance to members of captive audiences, diverting revenue from airport concessionaires, and creating the risk of defrauding airport patrons.

11. By limiting the activity addressed above to the areas outside the airport terminal buildings, the regulations limit the adverse effects of those activities and facilitate the monitoring of the effects of such activity on air terminal operations without preventing those who wish to engage in such activity to communicate with the airport patrons using the air terminal.

12. The need to monitor activities of those engaged in leafleting and solicitation of funds is demonstrated by the experience of having those activities performed in La Guardia Airport. Personnel at LaGuardia Airport have

noted repeated violations of the rules agreed to by the parties herein, and other objectionable conduct associated therewith, in the operations logs maintained at LaGuardia and in incident reports. These documents are kept in the ordinary course of business at LaGuardia Airport. Attached hereto as Exhibit C is a schedule describing the number and nature of the rules violations that have been reported by Port Authority personnel. As Exhibit C sets forth, between 1975 and 1986, Port Authority staff reported 183 rules violations and other conduct that interfered with the operation of the airport for the benefit of air passengers at LaGuardia. 31 of those incidents involved some form of fraud, deception, larceny, or physical confrontation.

13. The necessity to monitor leafleting and solicitation to prevent undesirable conduct associated therewith is based not only on experience at Port Authority airports, but also upon knowledge of illegal, fraudulent, and other abusive behavior in other locations. I have reviewed the affidavit of Philip Le B. Douglas, sworn to on October 12, 1984 and the exhibits thereto, already filed in this action. Mr. Douglas' affidavit describes a variety of conduct which demonstrates in unmistakable terms the necessity to monitor activity protected by the First Amendment to ensure that unprotected, illegal activity, such as fraud, misrepresentation, and larceny, does not take place in association with leafleting and solicitation.

14. The new regulations do not substantially interfere with access to air passengers. As set forth in the Supplemental Affidavit in Opposition of Frederick V. Hurst, Jr., an analysis of the last inflight survey of air

passengers using the Port Authority airports demonstrates that only 3% of the passengers using the North Terminal at Newark arrived at and left that terminal by air, that only 2% of the passengers using the Central Terminal Building at LaGuardia were on such "intra-terminal flights", and that only 0.7% of the passengers entering or leaving the United States using the International Arrivals Building at Kennedy had no need to leave the air terminal. The Court is respectfully requested to note that the fact that 2% of the passengers using the Central Terminal Building arrived and left that terminal by air does not mean that all of that 2% did not in fact venture out of the terminal, but merely that they had no need to do so to effect air connections.

/s/ Morris Sloane
MORRIS SLOANE

Sworn to before me this 21st
day of April, 1988.

/s/ Arnold D. Kolikoff
NOTARY PUBLIC

ARNOLD D. KOLIKOFF
Notary Public, State of New York
No. 24-4834667
Qualified in Kings County
Commission Expires June 30, 1989

Kennedy International, Newark International, and LaGuardia Airports Revision to Chapter III of Airport Rules and Regulations Addition of Regulations for Non-Commercial Activity Prohibition of Vending Machines

Currently, the conduct of individuals and organizations at all three airports are subject to the Airport Rules and Regulations. Chapter III, entitled "Commercial Activity", generally prohibits commercial activity at the airport without Port Authority consent, and prohibits specific commercial activity at the airports such as the distribution of literature, the posting of signs and the playing of musical instruments, without permission.

A recurring problem at the airports is the practice of groups and individuals using the airports as sites of organized conduct that is inconsistent with the intended purpose of the airports – the facilitation of air travel. Since these groups engage in such behavior for non-commercial purposes, such as religious observance and communication of political messages, their conduct is not regulated by the current version of Chapter III, which concerns commercial activity. Members of the International Society for Krishna Consciousness, Inc., which brought a lawsuit in Federal Court in New York in 1975 seeking access to the airports to distribute publications, solicit money and engage in related activity, currently engage in such conduct pursuant to a very limited permission granted to the organization pending the determination of the lawsuit, which is continuing.

Staff has proposed the adoption of regulations to regulate the non-commercial distribution of literature and related activity in interior public non-tenant areas of the

airports. These regulations would be made Part B of Chapter III. The current regulations concerning commercial activity, as amended, would be designated Part A.

The proposed Part B prohibits conduct in interior public non-tenant areas that creates the most serious problems of congestion and pedestrian annoyance. Part B prohibits leafleting, the solicitation of money and the sales of merchandise. Other non-commercial activity is prohibited to the extent that it interferes with airport operations.

The proposed Part A of Chapter III includes a provision prohibiting the installation of vending machines that sell goods in public non-tenant areas at the airports. Restroom vending machines selling personal hygiene items will not be prohibited because they satisfy passenger emergency needs.

The Port Authority has permitted vending machines to be installed in its space at the airports as a method of selling goods, but vending machines have been a disfavored method of distribution because their presence creates security, safety, congestion, aesthetics, maintenance and customer complaint problems. Over the past year, *USA Today* has made persistent requests to permit the installation of numerous newspaper vending machines in both Port Authority and airlines space at the airports, and has recently commenced an action in Federal Court in New Jersey to compel the Port Authority to permit the installation of newsracks at Newark International Airport. In the course of considering *USA Today*'s requests, staff has determined that a proliferation of such vending machines would have the adverse results of the

nature described above. In the course of these deliberations, staff has determined that a uniform policy prohibiting the sale of goods by vending machines in public non-tenant areas would eliminate the undesirable effects of such vending machines in public Port Authority space at the airports. Aviation staff will consult with the airlines as to the feasibility of eliminating the sale of goods by vending machines in public areas occupied by tenants. Staff shall take all steps necessary to insure that all goods and services, including newspapers and magazines, for which there is public demand, are conveniently available to airport patrons.

Whereupon, the following resolution was unanimously adopted by the Committee:

RESOLVED, that Chapter III of the Airport Rules and Regulation is repealed and replaced by the following:

CHAPTER III

COMMERCIAL AND NON-COMMERCIAL ACTIVITY

A. Commercial activity at Port Authority air terminals is subject to the following conditions and restrictions:

1. Any permission granted by the Port Authority directly or indirectly, expressly or by implication, to any person or persons, to enter upon or use any air terminal or any part thereof (including aircraft operators, crew members and passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of airlines, lessees and other persons occupying

space at such air terminal, persons doing business with the Port Authority, its lessees, sublessees and permittees, and all other persons whatsoever whether or not of the type indicated), is conditioned upon compliance with the Port Authority rules and regulations: and entry upon or into any air terminal by any person shall be deemed to constitute an agreement by such person to comply with said rules and regulations. As used herein, compliance with Port Authority rules and regulations includes compliance with the Port Authority master security plan for the air terminal and the submittal by certified air carriers of their security programs as required by Parts 121 and 129 of the Federal Air Regulations.

2. No person shall carry on any commercial activity at any air terminal without the consent of the Port Authority.

3. No vending machines for the sale of goods shall be permitted in the public areas of Kennedy International, Newark International and LaGuardia Airports which are not occupied by a lessee, licensee or permittee. This prohibition shall not apply to vending machines in restrooms selling personal hygiene items.

4. No person shall conduct sightseeing flights at any air terminal except under permit from the Port Authority. By sightseeing flights is meant flights on which passengers are carried for hire, and which originate and terminate at the same terminal with no intermediate stops other than emergency stops.

5. No person shall use any area of an air terminal for storage of cargo or other property without permission. If, notwithstanding the

above prohibition, a person uses such areas for storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the cargo or other property removed or to cause the same to be removed and stored at the expense of the owner or consignee thereof, without liability for damage thereto arising from or out of such removal or storage.

6. Unless otherwise provided in a lease or other agreement, no person shall use any area of an air terminal (other than the public aircraft parking and storage areas), for parking and storage of aircraft without permission of the Manager. If, notwithstanding the above prohibition, a person uses such areas for parking or storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the aircraft removed or to cause the same to be removed and stored at the expense of the owner thereof, without liability for damage thereto arising from or out of such removal or storage.

7. No person shall use or occupy an operational area for any commercial purpose whatsoever except a purpose pertaining to the servicing of tenants, concessionaires, airlines, activities associated with airlines, or governmental agencies, or a purpose connected with maintenance and operation of an air terminal. Persons so authorized must carry and/or display personal identification of the type and in the manner specified by the Manager.

8. No person shall land or take off an aircraft on or from a public landing area, or use a public landing area, public ramp and apron

area, public passenger ramp and apron area, public cargo ramp and apron area, or a public aircraft parking and storage area, except upon the payment of such fees and charges as may from time to time be prescribed or agreed to by the Port Authority.

9. All charges due to the Port Authority for the use of air terminals shall be payable in cash unless credit arrangements satisfactory to the Port Authority have been made in advance or permission has been secured for payment by check.

10. No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.

11. No person shall solicit funds for any commercial purpose at an air terminal without permission.

12. No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal:

(a) sell, or offer for sale, any article of merchandise; or

(b) solicit any business or trade, including the carrying of baggage for hire and the shining of shoes or bootblacking; or

(c) entertain any persons by singing, dancing, mime, acting, juggling or playing any musical instrument.

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:

1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.

(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

(d) The sale of any service.

(e) The sale of any raffle ticket or entry in a game of chance.

(f) The conduct of a game of chance.

2. The following conduct is prohibited at an air terminal:

(a) The intentional touching of any person without his or her consent.

(b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the

issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

(c) The intentional leaving of any item intended for distribution unattended.

(d) The attachment of any placard, sign, circular or other written material, on any wall, post, counter, billboard or any other surface.

(e) The erection of any table, chair, mechanical device or other structure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,	:	75 Civ. 5388 (MJL)
Plaintiffs,	:	SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PRELIMINARY INJUNCTION
-against-	:	
WALTER LEE, etc., et al.,	:	
Defendants.	:	

----------X

COUNTY OF NEW YORK :
ss:
STATE OF NEW YORK :

FREDERICK V. HURST, JR., being duly sworn, says:

1. I presently hold the position of Supervisor, Economic Analysis, Marketing and Economics Division of the Aviation Department of The Port Authority of New York and New Jersey (hereinafter called "the Port Authority"). I have held this position since 1973.

2. I submit this supplemental affidavit in opposition to plaintiffs' motion for summary judgment and a permanent injunction or, in the alternative, for a preliminary injunction prohibiting the enforcement of the policy on the distribution of literature and solicitation of money applicable to the passenger terminals controlled by the Port Authority in John F. Kennedy International Airport (hereinafter "Kennedy"), LaGuardia Airport (hereinafter

"LaGuardia"), and Newark International Airport (hereinafter "Newark"). (Hereinafter, the three airports will be collectively referred to as "the Port Authority airports.")

3. I received a Bachelor of Arts in Mathematics from Wagner College in 1950, and a Master of Arts in Mathemathical Statistics from Columbia University in 1954. I was awarded a Certificate in Survey Research from the Institute for Social Research of the University of Michigan in 1957. I also did post-graduate studies at the University of Southern California in 1961 and at the University of California at Berkeley in 1963 in the subject of mathematics. I have been employed by the Port Authority for more than 30 years in the field of market surveys, research and economic analysis. I am a member of the Institute of Mathematical Statistics, the Royal Statistical Society, the International Association of Travel Research and Marketing Professionals. I am the author of a variety of published articles concerning the conduct of statistically valid surveys of behavior in the travel industry.

4. In my present position, I direct, develop, implement and interpret and analyze marketing surveys of airport users such as air passengers and airport parking lot customers. My duties include directing, developing, implementing, and interpreting inflight surveys of air passengers using the Port Authority airports to develop statistically valid profiles of those air passengers.

5. The Port Authority has conducted such inflight surveys at six-year intervals since 1956. These surveys are used by the Port Authority to assess future demands for roadways, parking lots, inter-terminal connectors and many other services both on and off the airports, as part

of the Port Authority's continuing efforts to expedite the movement of air passengers to and from their flights.

6. Each interflight survey in the series since 1956 has been based on information provided by air passengers who filled out questionnaires on the flights boarded at a Port Authority airport. The last survey was conducted during a 12-month period ending September 30, 1985.

7. The population to be sampled in the 1984-85 survey was defined as all passengers enplaned on scheduled airline flights out of the Port Authority airports for the year ending September 30, 1985. This definition does not include corporate aircraft, non-scheduled airline activity, and commuter airline flights. The excluded flights represent no more than 3 percent of the total number of flights enplaned at the Port Authority airports.

8. The 1984-85 survey data presents a statistically valid profile of the population sampled because the survey sample was selected on a random basis and the validity of the sample was verified theoretically and empirically.

9. The 1984-85 survey was conducted by collecting questionnaires from passengers on each of 1,100 outbound flights chosen from the approximately 350,000 outbound flights in the population. Thus, a two-stage sampling method was employed.

10. The first stage of the sampling procedure was selection of the flights to be selected as samples. A

random sample of one flight per day from the total population of approximately 350,000 outbound flights to be selected for the sample was chosen as follows:

(a) All flight schedules effective on a subject day at a subject airport were listed in chronological order in the computer and assigned a number from one through the total number of flights that day. Then one of them was selected by a generally accepted method of random number generation and the flight bearing that number was the sample flight selected for that day at the airport.

(b) To select the random number, a computer millisecond clock was accessed at the last three decimal positions at the instant of demand for a three digit number. If the number fell within the range 001 to the number of flights that day at that airport in question, the number was used. If not, another random number was selected.

(c) The randomness of the first month's sample against the population of the population being sampled was verified by use of a Chi-square test. The Chi-square test is a test used in statistical analysis to determine whether a sample has been randomly selected from a population and thus is representative of the population from which it is drawn.

11. The second stage of sampling was the collection of questionnaires from passengers on the sampled flights. Survey representatives met with a selected flight's crew just before departure and supplied questionnaires to be distributed to passengers as they boarded. Questionnaires were not distributed to passengers on continuing international flights who did not enter the United States

at any of the Port Authority airports. The questionnaires were completed while the flight was enroute, collected by aircraft crew and returned by the airline in question. The number of passengers enplaned on each of the flights selected for inclusion in the sample was compared with the number of questionnaires received from that flight. If the response rate was less than 15%, the sampling was rescheduled. If the response rate was less than 100%, the questionnaire responses were weighted to represent the full passenger load. The average response rate was 50%.

12. The theoretical estimates of error for the results of the inflight survey can be derived with standard deviation analysis. Standard deviation analysis is a generally accepted method of determining the estimate of error for the results of random surveys. The survey sampled 17,000 passengers. Under standard deviation analysis, the theoretical estimate of error for the percentage results of the 1984-85 inflight survey of 17,000 passengers would not be more than one percentage point in 99 out of 100 other surveys conducted in the same manner as the 1984-85 survey. This statement of accuracy is sometimes expressed as stating that the percentages set forth herein are accurate within one percentage point, plus or minus.

13. An empirical test of the statistical validity of the entire survey was made by an independent comparison. Survey-based estimates of the number of cars left at each airport by passengers away for two, three, four, five, six, seven, and seven plus days were compared with the actual number of cars parked in airport parking lots for those periods. The airport parking lot counts are a matter of record provided by monthly reports from the public parking lot operators at each airport. The correspondence

between the survey estimates and the parking lot records provided unquestionable assurance that the survey sample of passengers was representative of the air passenger population from which it was drawn, with, at least, the high degree of fidelity implied by the theoretical estimate of error.

14. A copy of the survey questionnaire is attached hereto as Exhibit A. The sixth question block under Question No. 11, in the center column, contains questions directed at passengers who arrived at a Port Authority airport on another aircraft and left on the flight being surveyed. Question D in that block specifically inquires whether the passenger traveled between airline terminal buildings between flights.

15. (a) I have been asked to analyze the data gathered in the survey to determine the percentage of all passengers enplaned at each of three specific terminals who arrived at that terminal by air. The results of that analysis are as follows:

Terminal	Percentage of "intra-terminal flight" passengers
LaGuardia – Central Terminal Building	2%
Newark International Terminal – North Terminal	3%
John F. Kennedy International – International Arrivals Building	0.7%

(b) The Court should note the following with regard to the 3% figure for the North Terminal. In 1984-85, People Express, Inc. conducted scheduled flights in and out of the North Terminal. However, at present Continental Airlines, Inc., the only scheduled carrier operating out of the North Terminal, operates a reduced schedule of flights. The calculation arriving at the 3% figure set forth above was based on data from People Express flights corresponding to the current Continental schedule.

16. The percentage figures set forth in the preceding paragraph are statistically valid statements of the percentage of "intra-terminal flight" passengers because they are based on the data collected in the 1984-85 random sample inflight survey described above.

17. (a) The percentage figures set forth above are based on the numbers of questionnaires set forth below:

Terminal	Number of questionnaires
LaGuardia – Central Terminal Building	3,110
Newark International Terminal – North Terminal	2,560
John F. Kennedy International – International Arrivals Building	1,830

(b) Thus, each estimate of the percentage of passengers on "intra-terminal flights" was based on an analysis of 1,000 or more questionaires collected in the 1984-85 inflight survey. Under standard deviation analysis, the theoretical estimate of error for the percentage

for each terminal would not be more than one percentage point in 99 out of 100 other surveys conducted in the same manner as the 1984-85 survey. This statement of accuracy is sometimes expressed as stating that the percentages set forth herein are accurate within one percentage point, plus or minus.

/s/ Frederick V. Hurst, Jr.
FREDERICK V. HURST, JR.

Sworn to before me this 22nd
day of April, 1988.

/s/ Arnold D. Kolikoff
NOTARY PUBLIC

ARNOLD D. KOLIKOFF
Notary Public, State of New York
No. 24-4834667
Qualified in Kings County
Commission Expires June 30, 1989

Nº 101321

ID ☐☐☐☐☐

Please complete this questionnaire and return it to your Flight Attendant.

Airport Access Survey

A Study of Transportation to Airports in the New York/New Jersey Metropolitan Area.

WHY YOU HAVE BEEN GIVEN THIS QUESTIONNAIRE

The Port Authority of New York and New Jersey, who manages Kennedy Airport, together with your host airline, is conducting this survey to help improve airport services for you the passenger. Since one flight is selected at random from every 250 departures it is vital that every passenger on the selected flight complete the questionnaire.

WHO SHOULD ANSWER THE QUESTIONNAIRE

EACH ADULT AND TEENAGER is urged to complete this questionnaire. BOTH HUSBAND AND WIFE who might be travelling together on this flight should be sure to complete questionnaires. PASSENGERS WHO ARE SIMPLY CHANGING PLANES at Port Authority airports should also complete the questionnaire.

YOU MAY BE A WINNER!

Passengers on this flight are eligible for a weekly drawing for DINNER FOR TWO AT THE FAMOUS WINDOWS ON THE WORLD RESTAURANT ATOP THE WORLD TRADE CENTER IN NEW YORK CITY or at other select restaurants around the world. To be included in the drawing write your name and address in the space provided inside at the end of this questionnaire and hand it in. You are not required to answer this questionnaire in order to be eligible for the drawing.

1. **Which flight is this?** _____ (Airline) _____ (Flight Number) _____ (Date)

2. **At which airport did you first board this plane?**
   ☐ Kennedy Airport, OR ☐ another airport: _____ (airport name)

3. **At which city will you leave this plane?** _____ ☐☐☐ (13-15)

4. **If your immediate destination is in or close to the above city — check here** ☐
   IF IT IS NOT, What is your immediate destination city? _____ ☐☐☐ (16-18)

5. **Will you spend tonight in the city where you live?** Yes ☐ 19:1 No ☐ 2
   IF NO: A) In which city will you spend tonight? _____ ☐☐☐ (19-21)
   B) How many nights until you are back in your hometown again? ____ (22-23)

6. **Where do you live?** USA ☐ 24:1 Canada ☐ 2 Europe ☐ 3 Other ☐ 4
   IF USA: What is your home zip code? ☐☐☐☐☐ (25-29) OR _____ (City) _____ (State)
   IF NOT USA: City _____ **Country** _____

7. **Do you own a valid passport?** Yes ☐ 30:1 No ☐ 2
   IF YES: from which country? _____ ☐☐ (31-32)

8. **Is this a business trip?** Yes ☐ 33:1 No ☐ 2

9. **How many OTHER round trips by air have you made over the past twelve months?**
   ☐ None ☐ OR _____ trips (34-35)

10. **By the time this trip is completed how many nights will you have spent VISITING in the HUNTCOMN METROPOLITAN AREA?**
    0 ☐ 1 ☐ 2 ☐ 3 ☐
    ☐ More than 3. How many? _____ (36-38)
    How many of these nights in hotels/motels? All ☐ None ☐ OR # _____ (39-40)

HOW DID YOU GET TO KENNEDY AIRPORT TODAY?

11. For each TYPE OF TRANSPORTATION listed below, check "Yes" if you used it for any part of your trip to KENNEDY AIRPORT today, and answer detailed questions about your use of specific types of transportation in space below following your "Yes" check.

Did you use PRIVATE CAR? Yes ☐ 41:1 No ☐

A) Was your ride in the CAR shared with anyone else who is not with you in this flight? Yes ☐ 42:1 No ☐ 2

B) Was the CAR driven onto Kennedy Airport? Yes ☐ 43:1 No ☐ 2
   IF YES: 1) Was it driven directly to the airline's terminal curb to drop off passengers? Yes ☐ 44:1 No ☐ 2
   IF YES: Was the car then driven into an airport parking lot? Yes ☐ 45:1 No ☐ 2 Don't Know ☐ 3
   2) Was it driven directly into a parking lot without first stopping at airline terminal? Yes ☐ 46:1 No ☐ 2

C) Is the CAR now in a parking lot awaiting your return from this trip? Yes ☐ 47:1 No ☐ 2
   IF YES: Where is it parked? (Check your parking ticket stub if necessary)
   ☐ In an airport parking lot — circle lot #: 1 2 3 4 5 6 Shorthops 7 (48)
   8 ☐ In another parking lot — which one? _____

Did you use a RENTAL CAR? Yes ☐ 49:1 No ☐

A) Which rental agency?
   50:1 ☐ Avis 4 ☐ Dollar 6 ☐ National
   2 ☐ Budget 4 ☐ Hertz 6 ☐ Other _____

B) For how many days was the car rented? _____ (51-52)

C) What was the cost? _____ (53-55)
   Did this include insurance? Yes ☐ 57:1 No ☐ 2

D) Where was the car picked up? At JFK airport ☐ 58:1 At another location ☐ 2
   Where was the car dropped off? At JFK airport ☐ 59:1 At another location ☐ 2

Did you use TAXI? Yes ☐ 60:1 No ☐

A) Where did you board the TAXI? _____ ☐ 61

B) Where did you leave the TAXI? 62 ☐ JFK or 2 ☐ Other "specify" _____

C) Was the cost based on a meter? Yes ☐ 63:1 No ☐ 2 Don't Know ☐ 3

D) How much did it cost (including tip)? ___ ___ or ☐ Don't Know
   (64-67)

Did you use LIMOUSINE? Yes ☐ 68:1 No ☐

A) Was it private ☐ 69:1 or public (scheduled) ☐ 4

B) Which LIMO service did you use?
   70:1 ☐ Abbey Transport 4 ☐ Salem Limo
   2 ☐ Airport Transp. Svces 5 ☐ Trans/Port Limo
   3 ☐ Connecticut Limo 6 ☐ Tricentennial Limo
   4 ☐ Fugazy Limo 7 ☐ Winston Limo
   6 ☐ Long Island Limo 8 ☐ Other (Please specify)

C) How much did it cost? ___ (72-73) for 1 ☐ 74:1 2 ☐ 2 3 or more ☐ 3

Did you use BUS? Yes ☐ 75:1 No ☐

A) Which BUS service did you use?
   75:1 ☐ Carey Motor Coach 3 ☐ Shortline Flight Catcher
   2 ☐ Q10 Green Line Bus 4 ☐ Other, please specify _____

Did you use AIRPLANE? Yes ☐ 76:1 No ☐

A) City where boarded? _____ (77-78) Time on ___ ___ (79-80)

B) Name of airline? _____ (81-82) Time off ___ ___ (83-84)

C) Airport at which you left that plane? LGA ☐ 85:1 JFK ☐ 2 NWR ☐ 3 Other ☐ 4

D) Did you arrive in one airline terminal building at Kennedy Airport and have to go to another building to board this plane? Yes ☐ 86:1 No ☐ 2

Did you use HELICOPTER? Yes ☐ 87:1 No ☐

A) Name of airline/operator? _____ ☐☐ (88-89)

B) Where boarded Manhattan ☐ 90:1 LGA ☐ 2 JFK ☐ 3 NWR ☐ 4 Other ☐ 5

Did you use RAIL? Yes ☐ 91:1 No ☐

A) Which one?
   92:1 ☐ LIRR 3 ☐ Metro North 6 ☐ "Train to the Plane"
   2 ☐ Amtrak 4 ☐ NJ Transit 6 ☐ Subway

Did you use FREE COURTESY CAR, VAN or BUS? Yes ☐ 93:1 No ☐

A) Where did you board it? _____ (94-95)

12. A) **Your trip to Kennedy Airport started:**
    96:1 ☐ From a private home 3 ☐ From a hotel/motel
    2 ☐ From an office 4 ☐ From a school/military base
    B) **Zip Code of above location:** ☐☐☐☐☐ (100-104) **or, if you don't know Zip:**
    Street address: _____ (the nearest street intersection or name of house etc.)
    C) **In which city?** _____ **State?** ☐ NY ☐ NJ ☐ CT ☐ Other _____
    D) **If you started in New York City, in which borough?**
    Manhattan ☐ 105:1 Queens ☐ 2 Staten Island ☐ 3 Bronx ☐ 4 Brooklyn ☐ 5

13. **Did you spend last night in the city where you live?** Yes ☐ 106:1 No ☐ 2
    IF NOT a) In which city did you spend last night? _____ ☐☐☐ (107-109)
    b) How many nights since you were last in your hometown? ____ (110-111)

14. **Your time spent enroute to and at Kennedy Airport:**
    A) At what time did this flight leave FROM KENNEDY? _____ : ☐☐ AM/PM (112-113)
    B) At what time did you ARRIVE AT KENNEDY to board this flight? _____ : ☐☐ AM/PM (114-115)
    C) At what time did you start your trip to KENNEDY? _____ : ☐☐ AM/PM (116-117)

15. **Please check one box below to show whether or not you are using one of the special tickets indicated:**
    116:1 ☐ Travel Agent's Employee Ticket
    4 ☐ Airline Employee or Relative's Ticket
    2 ☐ Not using either of above special tickets

16. **The ticket for your ride on this flight covers transit**
    A) From: _____ to: _____ ☐☐ (120-121) ☐☐ (122-123)
    B) **Does it cover the reverse direction also?** Yes ☐ 124:1 No ☐ 2
    C) **How much did it cost?** _____ (125-128) or Don't know ☐

17. **Does your ticket provide for seating in First Class?** Yes ☐ 129:1 No ☐ 2

18. **Your age?** 12-19 ☐ 130:1 25-34 ☐ 3 45-54 ☐ 5 65 plus ☐ 7
    20-24 ☐ 2 35-44 ☐ 4 55-64 ☐ 6

19. **Your sex?** Male ☐ 131:1 Female ☐ 2

20. **Your marital status?** Single ☐ 132:1 Married ☐ 2 Widowed ☐ 3

21. **Please check your current work status below:**
    133:1 ☐ Working full time 3 ☐ Retired 5 ☐ Housewife/homemaker
    2 ☐ Full time student 4 ☐ Working part time 6 ☐ Seeking employment
    IF working, retired or seeking employment write in:
    Job Title _____ ☐☐ (141-142)
    Type of Company or Organization: _____ ☐☐ (143-144)

22. **What is your highest year of formal education completed (circle one)** (145-146)

8	9,10,11,12	13,14,15,16	17,18,19 or more
elementary school	high school	college	graduate studies

23. **What is your household income?**
    Yours, plus that of your spouse/others in your household
    147:1 ☐ to $10,000 3 ☐ to $30,000 5 ☐ to $60,000 7 ☐ to $100,000
    4 ☐ to $20,000 4 ☐ to $40,000 6 ☐ to $80,000 8 ☐ $100,000 and more
    Number of incomes included above: 1 ☐ 148:1 2 ☐ 2 3 or more ☐ 3

24. **How many people are there in your household (include yourself)?**
    Adults ___ (149) **Teenagers** ___ (150) **Children (2-12 yrs)** ___ (151) **Infants under 2** ___ (152)

25. **Are you travelling in a charter or tour group today?** Yes ☐ 153:1 No ☐ 2
    IF YES. About how many in the group? 154:1 ☐ 20 or less 4 ☐ 21 or more

26. **Your PERSONAL travel Party — Are you making this trip:**
    155:1 ☐ with your husband or wife and/or 3 ☐ with friends or business Assoc.
    and/or 2 ☐ with other relatives OR 4 ☐ alone

27. **If you are Not Making this trip alone — How many OTHERS are in your PERSONAL travel party?**
    Adults ___ (156) **Teenagers** ___ (157) **Children (2-12 yrs)** ___ (158) **Infants under 2** ___ (159)

28. **Space is provided below for your name and address. We would like to have it so that we can check the validity of some questionnaires. Even if you choose to remain anonymous however, we value your questionnaire highly and THANK YOU FOR YOUR COOPERATION. If you want to be entered in the weekly drawing for two dinners, however, we must have your name and address.**

NAME _____

STREET ADDRESS _____

CITY _____ STATE _____ ZIP ☐☐☐☐☐ (160-164)

HOME TELEPHONE _____ BUSINESS _____

EXHIBIT A

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Filed May 10, 1988)

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al., Plaintiffs, -against- WALTER LEE, et al., Defendants.	75 Civ. 5388 (MJL)

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, plaintiffs International Society for Krishna Consciousness, Inc. and Brian Rumbaugh instituted this action on October 29, 1975 against the Port Authority of New York and New Jersey (the "Port Authority") and Eastern Air Lines and Walter Lee, Chief of Port Authority Police, individually and in his official capacity; and;

WHEREAS, the airlines who lease space (the "Airline Defendants"[1]) from the Port Authority at John Fitzgerald Kennedy International ("JFK") Airport, LaGuardia Airport, and Newark International Airport, (the "New York Airports") were made parties to this action by service

[1] The "Airline Defendants" are listed below as signatories to this agreement.

upon them of a Summons and First Amended Complaint dated October 27, 1977 ("First Amended Complaint"); and

WHEREAS, the First Amended Complaint alleged that the general circulation areas of the space leased by the Airline defendants from the Port Authority was, and is, a public forum appropriate for the exercise of expressive activities, and that certain policies and practices of the Airline Defendants prohibiting the distribution of literature and solicitation of contributions in the leased areas at the New York Airports, constituted state action in derogation of plaintiffs' first amendment rights; and

WHEREAS, the Airline Defendants maintained and continue to maintain that their policies prohibiting plaintiffs' activities in the Airline Defendants' leased space do not constitute state action and thus cannot violate plaintiffs' constitutional rights; and

WHEREAS, the Airline Defendants maintained and continue to maintain that even if their policies constitute state action, none of the areas leased by the Airline Defendants is an appropriate public forum for the exercise of plaintiffs' proposed activities and none of the Airline Defendants' policies violate any constitutional rights of plaintiffs; and

WHEREAS, none of the issues set forth above or otherwise raised by this litigation have been resolved; and

WHEREAS, the parties to this agreement desire to settle the above-styled lawsuit and thereby resolve all differences among them;

NOW, THEREFORE, in consideration of the premises and the mutual promises and other consideration recited herein, the undersigned parties hereby stipulate and agree as follows:

1.

The Airline Defendants will pay to plaintiffs the total sum of $165,000.00 within 30 days of the date hereof.

2.

The plaintiffs hereby release and forever discharge each of the Airline Defendants, its officers, directors, servants, agents, attorneys, trustees, successors or assigns and any other airline which presently or in the future leases space, directly or indirectly, at the New York Airports from the Port Authority whether or not a defendant herein, from any and all claims, demands, rights of action, causes of action, lawsuits, damages, attorneys' fees, losses and expenses of any nature whatsoever, in law or in equity, which the plaintiffs, or any members of the International Society for Krishna Consciousness have or have had, or may hereafter claim to have had, against any of the Airline Defendants, arising from or by reason of any matter, act, omission, cause or thing whatever, whether known or unknown, foreseen or unforeseen, which has heretofore occurred relating in any way to any policy, act, practice, or decision, of any Airline Defendant or any combination of Airline Defendants, not to allow plaintiffs to distribute literature, solicit contributions, sell books or other materials, practice "Sankirtan" or perform any other alleged First Amendment activities in any

space leased by any Airline Defendant in any of the New York Airports identified above, and further including, but not limited to, any and all claims that have been asserted or could have been asserted or that relate in any manner to the facts or claims described in the lawsuit currently styled *International Society for Krishna Consciousness, Inc. and Brian Rumbaugh on behalf of themselves and all International Society for Krishna Consciousness, Inc. members, Plaintiffs, against Walter Lee, et al., Defendants*, 75 Civ. 5388 (MJL), pending in the United States District Court for the Southern District of New York. By this paragraph, plaintiffs do not release or discharge any person or entity not specifically referred to in this paragraph.

3.

Plaintiffs hereby agree to dismiss the above-styled lawsuit with prejudice with each party to bear its own costs.

4.

Notwithstanding the plaintiffs' dismissal of the above-styled lawsuit with prejudice and any other provision herein, the Airline Defendants expressly agree that, in the event that a person or entity unrelated in any manner to, and not induced, funded or actively supported by plaintiffs or the International Society for Krishna Consciousness (the "Unrelated Plaintiff"), successfully prosecutes an action against any of the Airline Defendants in which the Unrelated Plaintiff obtains a final judgment establishing that: (1) an Airline Defendant's policies or practices substantially similar to those

involved in the above-styled lawsuit constitute state action, (2) the leased space of the Airline Defendant is a public forum appropriate for the exercise of solicitation and distribution activities similar to those plaintiffs sought to exercise in the above-styled lawsuit, and (3) the Unrelated Plaintiff has a constitutional right to perform such activities in the Airline Defendant's leased space such that the Airline Defendant is judicially required to allow access to its leased space at a New York Airport to individuals or entities to perform solicitation and distribution activities similar to those sought to be performed by plaintiffs in the above-styled lawsuit; then, plaintiffs will, subject to reasonable time, place and manner restrictions, be allowed access to the leased space of that Airline Defendant on the same terms and conditions as accorded the Unrelated Plaintiff in the litigation described in this paragraph.

5.

The parties to this Agreement specifically acknowledge that this Agreement does to preclude plaintiffs from continuing to pursue or from subsequently pursuing claims against the Port Authority or the Chief of the Port Authority Police for access to Port Authority-controlled, non-leased space at the New York Airports. At the present time, the parties expressly acknowledge that the only Port Authority-controlled, non-leased space at the New York Airports is the area in the central "Arrivals Building" (Building Number 50) at JFK Airport highlighted in yellow on the attached Exhibit "A," the "Central Terminal Area" and the corridors at LaGuardia Airport highlighted in yellow on the attached Exhibit "B" and the "North

Terminal" at Newark Airport. Plaintiffs expressly agree that the success or failure of any attempt to gain additional access to non-leased, Port Authority-controlled space shall have no effect whatsoever on any of the Airline Defendants and that in no event whatsoever shall plaintiffs ever seek access to any airline-leased space other than as set forth in paragraph 4 above.

6.

Plaintiffs expressly warrant and represent that this agreement is intended to be binding upon plaintiffs and all members of plaintiff International Society for Krishna Consciousness, Inc., the Bhaktivedanta Book Trust, and all members of the International Society for Krishna Consciousness who may be in privity with plaintiffs herein. Plaintiffs expressly warrant and represent that: (1) they will not attempt to relitigate any of the issues raised in the above-styled lawsuit against the Airline Defendants with respect to the New York Airports, on behalf of any other members of plaintiff corporation or the International Society for Krishna Consciousness, or any other person or entity, and (2) they will not fund, actively support, induce or attempt to induce any other person or entity to do so.

7.

This Settlement Agreement and Release is not and shall not be construed to be an admission by any of the parties to this Agreement of the validity or invalidity of any of the claims asserted in the above-styled lawsuit, or of the liability of any party with respect to any such

claim, or that the Airline Defendants have any liability to plaintiffs whatsoever. Neither plaintiffs nor defendants shall be deemed to have prevailed as against the other in this action by reason of this agreement or by reason of any final judgment which may be awarded against the Port Authority or any other party to this lawsuit. Plaintiffs expressly warrant that the payment received hereunder is in full settlement of and precludes any further claim to any award of attorneys' fees pursuant to 42 U.S.C. §1988 or any other rule, be it statutory or judicial.

8.

Each party to this agreement is prohibited from disclosing any of the terms of this Settlement Agreement and Release (except as provided herein) other than as necessary to comply with or enforce the terms of this Settlement Agreement or to satisfy accounting or regulatory requirements. However, the parties shall be permitted to disclose that: (a) prior to the entry of the Dismissal With Prejudice referred to above, the fact, and only the fact, that the litigation between them has been "settled," or (b) that after the Dismissal With Prejudice has been entered, the fact, and only the fact, that the case has been "finally settled." In the event of an order of any court requiring either party to testify to the fact of or to the terms of this Agreement, compliance with such an order by either party shall not be deemed a breach of this agreement.

9.

This Settlement Agreement sets forth the entire agreement between the parties and all prior understandings and agreements heretofore had between the plaintiffs and the Airline Defendants are merged into this Agreement.

10.

This Agreement may not be altered, amended, changed, waived, terminated or modified in any respect or particular unless the same shall be in writing and signed by or on behalf of the party to be charged therewith.

11.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, trustees, legal representatives, successors and assigns.

12.

This Agreement shall be interpreted in accordance with the law of the State of New York.

IN WITNESS WHEREOF, the undersigned have caused this release to be signed this 3rd date of May, 1988.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.

By:/s/ illegible
Authorized Agent
Title
BRIAN RUMBAUGH

/s/ Brian Rumbaugh

AMERICAN AIRLINES, INC., ALITALIA- LINEE AEREE ITALINANE, S.p.A., BRANIFF, INC., BRITISH AIRWAYS, CONTINENTIAL AIRLINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., KLM ROYAL DUTCH AIRLINES, INC., MIDWAY AIRLINES, INC., NORTHWEST AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, PIEDMONT AIRLINES, TRANS WORLD AIRLINES, UNITED AIRLINES, INC. and USAIR, INC.

By: /s/William H. Boice
WILLIAM H. BOICE

Attorney for above listed Airline Defendants a/k/a Air Canada Group Defendants

KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

AIR-INDIA, IBERIA AIRLINES OF SPAIN, ICELANDAIR, IRISH INTERNATIONAL AIRLINES, JAPAN AIRLINES, SCANDINAVIAN AIRLINES SYSTEM and VARIG BRASILIAN AIRLINES

By: /s/ Philip Le B. Douglas
PHILIP LE. B. DOUGLAS

Attorney for above listed Airline Defendants a/k/a Air India Group Defendants

WINTHROP, STIMSON,
PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

LUFTHANSA GERMAN AIRLINES

By: /s/ Alan D'Ambrosio
ALAN D'AMBROSIO, P.C.

Attorney for Lufthansa German Airlines

501 Fifth Avenue
New York, New York 10017
(212) 370-1600

AIR FRANCE

By: /s/ John Martin
JOHN MARTIN

Attorney for Air France

BIGHAM, ENGLAR,
JONES & HOUSTON
14 Wall Street
New York, New York 10005
(212) 732-4646

SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD.

By: /s/ Laurence A. Short
LAURENCE A. SHORT

Attorney for Swissair

SHORT, KLEIN & KARAS, P.C.
1101 Thirtieth Street, N.W.
Suite 303
Washington, D.C. 20007

So ORDERED, this 5 day of May, 1988.

/s/ illegible
United States District Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Plaintiffs,

-against-

WALTER LEE, Superintendent of the Port Authority Police, individually and in his official capacity, *et al.*,

Defendants.

----------x

75 Civ. 5388 (MJL)

DEFENDANT SUPERINTENDENT'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b) and Rule 7 of the Rules for Proceedings Before Magistrates, defendant Henry I. De Geneste, Superintendent of the Port Authority Police (hereinafter "Superintendent")* hereby files the following objections to the Report and Recommendation dated October 25, 1988 (hereinafter "Report") of United States Magistrate Michael H. Dolinger in the above-captioned case.

The Superintendent objects to the recommendation that the plaintiffs' motion for summary judgment be granted. The Superintendent specifically objects to the

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* Mr. De Geneste is the present incumbent of the position formerly held by defendant Walter Lee.

Report insofar as it recommends that this Court hold that the rule of The Port Authority of New York and New Jersey (hereinafter "Port Authority") requiring non-commercial leafleting and the solicitation of funds to be conducted on the exterior portions of airport terminals is unlawful as a prohibition of First Amendment activity in a public forum.

The Superintendent further objects to the Report insofar as it does not recommend that the plaintiffs' motion be denied on the alternative grounds that,

(a) The Port Authority airport passenger terminals are non-public fora and the Port Authority regulation is a lawful restriction of First Amendment activities in non-public fora; or,

(b) There are triable issues of fact regarding the public forum status of the Port Authority airport passenger terminals; or

(c) Even if it is assumed, contrary to law, the Port Authority airport passenger terminals are public fora, the Port Authority regulation is a time, place and manner restriction that is beyond the scope of this suit; or,

(d) Even if it is assumed, contrary to law, the Port Authority airport passenger terminals are public fora, and it is held that this suit encompasses the validity of time, place and manner regulations, the Port Authority regulation is lawful as a reasonable time, place and manner restriction in a public forum; or, there are triable issues of fact regarding the legality of the Port Authority's regulations.

Pursuant to the foregoing objections, the Superintendent respectfully requests this Court to deny plaintiffs' motion for summary judgment and a permanent injunction in a *de novo* determination pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) for the reasons set forth herein.

Dated: New York, New York
December 14, 1988

PATRICK J. FALVEY
Attorney for Defendant
Superintendent of
Port Authority Police
One World Trade Center – 66E
New York, New York 10048
(212) 466-8794

By: /s/ Arthur P. Berg
ARTHUR P. BERG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Plaintiffs,

-against-

WALTER LEE, et al.,

Defendants

DOC #
75 Civ. 5388 (MJL)

JUDGMENT

(Filed Oct. 19, 1989)

Plaintiffs having moved by notice dated November 11, 1987 for summary judgment declaring invalid certain rules, regulations, policies and practices of the Defendants and enjoining Defendants from enforcing any such rules, regulations, policies or practices; and the matter having been referred to Magistrate Michael H. Dolinger for report and recommendation; and the Magistrate having recommended in Report and Recommendation dated October 25, 1988 that Plaintiffs' motion for summary judgment be granted; and the Defendants having submitted objections to such Report and Recommendation and the Plaintiffs having filed response thereto; and the Court having rendered its opinion and order dated September 14, 1989 adopting such Report and Recommendation and granting the motion of Plaintiffs for summary judgment, it is now

ADJUDGED AND DECLARED that the public areas of the passenger terminals at John F. Kennedy Airport,

LaGuardia Airport and Newark International Airport including the public interior areas of such terminals, are public fora; that the current rules, regulations, policies and practices of the Port Authority of New York and New Jersey prohibiting the sale or distribution of literature or the solicitation or receipt of contributions in such public areas are void and unconstitutional, and it is further

ADJUDGED AND DECREED that the Defendants, and each of them, and their agents, servants, attorneys and employees are permanently enjoined from enforcing or attempting to enforce any such rule, regulation, policy or practice.

Dated: _____

ENTER

_____

U.S.D.J.

illegible 10-23-89

SDNY
0208-01: 75C. 5388
Judge Lowe.

UNITED STATES COURT OF APPEALS

FOR THE

Second Circuit

MANDATE

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of February, one thousand nine hundred and ninety-one.

Present: HON JAMES L. OAKES, Chief Judge
HON. RALPH K. WINTER
HON. ROGER J. MINER
Circuit Judges,

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members,

Plaintiffs-Appellees,

-v-

WALTER LEE, Superintendent of Port Authority Police,

Defendant-Appellant.

Docket No. 89-9181

(Filed Feb. 25, 1991)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part in accordance with the opinion of this court.

Elaine B. Goldsmith, Clerk
By:

/s/ Edward J. Guardaro,
Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ Elaine B. Goldsmith
Clerk

ISSUED AS MANDATE:
May 6, 1991

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

Nos. 91-155, 91-339

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF PETITIONERS AND CROSS-RESPONDENTS

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in finding, in conflict with decisions of the District of Columbia, Fifth, Seventh, Eighth, and Ninth Circuits, that public spaces of airports are not "public forums."

2. Whether the distribution of literature and the solicitation of charitable contributions may be prohibited in the public areas of the New York metropolitan airports, which correspond to public thoroughfares presumptively available for free speech.

3. Whether, even if it is found that airport terminals are a nonpublic forum, the distribution of literature or the solicitation of donations may be banned absent a showing that they are inherently disruptive of airport operations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-155, 91-339

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS AND CROSS-RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals, Appendix to Petition for Certiorari (App.) 1, is reported at 925 F.2d 576. The opinion and order of the district court, App. 29, is reported at 721 F. Supp. 572. The Magistrate's Report and Recommendation, App. 49, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1991, and a petition for rehearing was denied and suggestion for rehearing en banc declined on April 25, 1991. App. 74. Petitions for writs of certiorari

were filed by petitioners (No. 90-155) on July 24, 1991, and by cross-petitioner (No. 91-339) on August 26, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

The relevant constitutional and regulatory provisions are set out at pages 1-2 of the Petition for Certiorari and pages 517-24 of the Joint Appendix.

STATEMENT

1. Petitioners challenge a complete ban on core protected expression—the distribution of literature and the solicitation of charitable contributions—imposed by the Port Authority of New York and New Jersey in the terminals of the three principal New York airports. That such a ban is invalid had, prior to the decision below, been the conclusion of all five courts of appeals to have considered the question. Moreover, over some two decades, distribution and solicitation by political and religious groups have become an accepted feature of major airports throughout the country. Locally devised and implemented time, place and manner regulations have effectively preserved the public forum while protecting the legitimate governmental interests involved.

The Port Authority promulgated its ban, which has never been enforced, more than a dozen years after it had informally established just such a time, place and manner system. That system remains in effect, and problems under it have been predictably minor.

The challenged prohibition claims sanction on the sole ground that distribution and solicitation are inconsistent with the "purpose" of the airport. The Port defines that "purpose," however, purely by ipse dixit, given the profusion and variety of activities in the public, open areas

of the terminal that the Port Authority permits and encourages.

The rules currently in effect at the New York airports and many others maintain the existence of the marketplace of ideas in these key fora without threatening disorder. The Port Authority's flat prohibition shuts the marketplace down entirely.

2. Petitioners and cross-respondents (petitioners), the International Society for Krishna Consciousness, Inc., a not-for-profit New York religious corporation, and Brian Rumbaugh, one of its members (collectively ISKCON), follow the teachings of Krishna Consciousness, a religion within "the broad theological umbrella of the Vaishnava tradition of Bhakti Hinduism, formalized in the ninth century in Southern India." *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 433 (2d Cir. 1981). Krishna Consciousness was introduced in America in 1965 by A.C. Bhaktivedanta Swami Prabhupada.

In accord with the central importance of scripture to the religion, Srila Prabhupada translated and wrote over 100 books, including the *Bhagavad-gita*, the 25-volume *Srimad-Bhagavatam*, and 17 volumes of *Sri Caitanya-caritamrta*. He also instructed his followers to disseminate the written teachings as widely as possible. ISKCON members, like colporteurs of other faiths, are required to venture into public places in order to proselytize, distribute religious literature, seek support, including donations, and provide information about their religion. Called *sankirtan* in Sanskrit, this activity lies at the core of Krishna Consciousness and is its very lifeblood. *See Barber*, 650 F.2d at 443.

When this lawsuit was filed, Walter Lee was the Superintendent of Police of the Port Authority of New York and New Jersey. The Port Authority was created in 1921 by interstate compact, N.Y. Unconsol. Law §§ 6401-6423 (McKinney 1979 & Supp. 1991); N.J. Stat.

Ann. §§ 32:1-1 to -24 (West 1990 & Supp. 1991). As one of its functions, the Port Authority operates John F. Kennedy, LaGuardia and Newark Airports under leases with the States of New York and New Jersey, which own the airports.

In 1947, the Port Authority assumed jurisdiction over the air terminals, *see* N.Y. Unconsol. Law § 6631 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:1 (West 1990), as a fundamental public function:

> The effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance and operation of air terminals by the Port Authority is and will be in all respects for the benefit of the people of the States of New York and New Jersey for the increase of their commerce and prosperity, and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance or operation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. Law § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:4 (West 1990).

3. JFK, Newark, and LaGuardia airports are vital to life in the New York metropolis. Linked to the metropolitan area by a network of eight major highways, *e.g.*, Joint Appendix (JA) 382, they constitute the busiest airport complex in the world, JA 355. In 1986, the three airports served 78,846,000 passengers—7.8 percent of the entire domestic market, and 54.4 percent of the trans-Atlantic market, JA 297—indeed, JFK is the Nation's leading international gateway. By the end of this century, this number is expected to increase to more than 110 million passengers a year, JA 355, a figure that does not include "meeters and greeters" and other visitors to the terminals. In 1986, the three airports employed 64,100 people, at an estimated annual payroll of $2.1 billion. JA 297.

Neither the Port Authority nor the airlines limit or monitor public access to the three airports or to the public areas of the terminals. People freely wander about and use the facilities within the terminals for shopping, eating and drinking, banking, looking at art, and sightseeing, as well as air travel.

Petitioners do not seek to distribute literature or solicit contributions in private offices, ticket counters, check-in areas, baggage claim areas, arrival and departure gates, or gate waiting areas. Rather, ISKCON members seek to distribute religious literature and solicit voluntary donations only in general circulation areas. JA 114-15.

Like the cities they serve, all three airports offer a complex environment. The airports encompass restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, bookstores, newsstands, seating areas, advertising displays, public information stations, dental offices, private clubs—even a branch of Bloomingdale's. *See* JA 183-85 (Newark), JA 185-86 (JFK), JA 190-92 (LaGuardia).

Before this lawsuit was filed, the Port Authority, by agreement, permitted petitioners and others "to distribute literature and solicit contributions within appropriate public areas of [the] air terminals," JA 63, which it owns and operates. These areas include: (1) the second-floor central lobby at LaGuardia; (2) the main lobby of the North Terminal at Newark; (3) the mezzanine level of Terminal B at Newark; and (4) the second floor central lobby and mezzanine area of the IAB. JA 113. In June, 1985, Morris Sloane, then Deputy Director of Aviation, testified that the arrangement between petitioners and the Port Authority "has gone fairly well." Deposition of Morris Sloane at 75 (June 10, 1985). The agreement continues in force.

4. This action was filed on October 25, 1975. On the same day, ISKCON sought a temporary restraining order

and a preliminary injunction against enforcement of Port Authority regulations, N.Y. Admin. Code tit. 21, §§ 1260.13-.15, that required a license as a condition of the exercise of speech at the three airports. The Port Authority and Mr. Lee moved to dismiss. *International Soc'y for Krishna Consciousness v. New York Port Auth.*, 425 F.Supp. 681 (S.D.N.Y. 1977). Judge Carter denied the motion to dismiss with respect to Mr. Lee, but dismissed the Port Authority. The court, although noting that the regulations were unconstitutional on their face as granting unbridled discretion to deny licenses, *id.* at 687, denied a preliminary injunction, on the ground that the airlines that leased space from the Port Authority were indispensable parties, *id.* at 686.

Twenty-eight airline defendants moved to dismiss the complaint on November 8, 1979, asserting that the prohibition of expression in the leased areas of the airports was not "state action." The Port Authority denied that its regulations applied to the leased areas, or that the regulations applied to non-commercial activities. *See, e.g.*, Defendant Walter Lee's Memorandum In Opposition To Plaintiffs' Motion For A Preliminary Injunction at 2 (Nov. 7, 1979). Plaintiffs again moved for a preliminary injunction against both the Port Authority and the airlines.

The district court denied both motions. On the motion to dismiss, the court held that the "symbiotic relationship" between the airlines and the Port Authority established state action. Memorandum Opinion and Order at 46-55 (July 23, 1982). The court denied the preliminary injunction motion as moot because the Port Authority represented that the regulations in effect in 1982 did not apply to non-commercial activity. *Id.* at 58.

On April 20, 1983, the district court certified, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal by the airlines of the denial of their motion to dismiss. The court of appeals granted leave to appeal, but remanded the case for further development of the record. *International Soc'y for Krishna Consciousness v. Air Can.*, 727 F.2d 253, 255 (2d Cir. 1984).

After discovery, which involved an excursus into the Hague Convention, *see International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 438 (S.D.N.Y. 1984), the airlines again moved to dismiss. On June 1, 1987, Magistrate Dolinger recommended that the motions be denied.

On November 11, 1987, petitioners moved for summary judgment, or, in the alternative, for a preliminary injunction, on the state action and public forum issues. Before any ruling on the motion, the airlines were dismissed from the case under a settlement agreement, mooting the state action question. *See* JA 534.

After the airlines were dismissed, the Port Authority, for the first time, more than twelve years after the action was filed, asserted a right to prohibit ISKCON's activities in the terminal areas under the Port Authority's exclusive control. On February 11, 1988, the Port Authority promulgated a resolution codifying this policy. Under the resolution, the "continuous or repetitive" sale or distribution of literature and solicitation of donations is prohibited. JA 523-24.[1]

The only justification for the restriction expressed in the resolution is that the expressive activities by nonprofit organizations are inconsistent with the "intended purpose of the airports—air travel." JA 517. Between 1985, when Mr. Sloane testified that the arrangement allowing petitioners to distribute literature and solicit funds in the terminals "has gone fairly well," and 1988, when the new resolution was promulgated, Port Authority staff alleged only two rules violations, both for "verbal abuse." *See* Sloane Affidavit, Exhibit C.

Based upon the Port's representation at argument that during the litigation petitioners would be permitted to

[1] There are indications in the preamble that the resolution was specifically directed at ISKCON. *See* JA 517.

continue the distribution of religious literature and solicitation of donations in the interior terminal areas, JA 494, petitioners conditionally withdrew their request for preliminary injunction, JA 505-506.

On October 25, 1988, Magistrate Dolinger recommended that petitioners' motion for summary judgment be granted. The magistrate found that "the general circulation areas of the passenger terminals . . . are public fora, and that a total prohibition against leafletting and solicitation within these buildings is inconsistent with the requirements of the first amendment." App. 72. He found that the

> interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, and other businesses, with travelers or other members of the general public coming and going as they please." . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (quoting *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988)).

The Port Authority objected to the Magistrate's Report, JA 545, but the district court issued an Order and Opinion on September 15, 1989, adopting the magistrate's recommendation and granting summary judgment for petitioners. Applying *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the court found the general circulation areas of the airport terminals "possess the characteristics of a bustling metropolitan boulevard," App. 40, 721 F.Supp. at 576, and are "the functional equivalent of public streets," App. 41, 721 F.Supp. at 577. The court agreed that "the airports' character, pattern of activity and nature of

purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." App. 47, 721 F.Supp. at 579.

5. A divided panel of the court of appeals affirmed in part and reversed in part. Acknowledging that it had initially intended to affirm the judgment in its entirety, it concluded that the intervening opinion in *United States v. Kokinda*, 110 S.Ct. 3115 (1990), had "altered public forum analysis." App. 10, 925 F.2d at 580.

Until *Kokinda*, the majority believed, streets, and sidewalks were treated as traditional public fora without "a detailed analysis of their particular purposes." App. 11, 925, F.2d at 580. It asserted, however, that *Kokinda* made a forum's "purpose" dispositive. App. 13-14, 925 F.2d at 582. The majority read *Kokinda* as holding that when the "particular purpose of a place" is such that "the public uses [it] as a matter of necessity, or at least great convenience," the "in-person solicitation of funds" may be banned. *Id.* The court, however, counted at least five *Kokinda* votes as permitting the in-person distribution of literature in the same place. *Id.* Accordingly, it reversed "insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirm[ed] insofar as it invalidated the Port Authority's ban on the distribution of literature." App. 3, 925 F.2d at 577.

Chief Judge Oakes dissented because he "believ[ed] that *Kokinda* [wa]s neither controlling nor a substantial deviation from the Court's public forum analysis." App. 17, 925 F.2d at 583. While recognizing that "the purposes of a forum are highly relevant to the traditional public forum inquiry," App. 18, 925 F.2d at 583, he asserted "that a forum's purpose alone can[not] dictate its status," *id.* If this were the case, then "[v]irtually all Government owned property" that "has an ostensible 'purpose' other than the promotion of free speech, as-

sembly, and debate," *id.*, would be unavailable for the exercise of First Amendment rights. Public forum analysis, the dissent maintained, turns not solely upon a forum's purpose, but rather upon a myriad of factors, all discussed in *Kokinda*, including the forum's location, the degree of access which the public has to the forum, and whether the forum in question has traditionally been used for expressive purposes. App. 20, 925 F.2d at 584. Applying these factors, Judge Oakes would have found the airport terminals to be "traditional public fora." App. 26, 925 F.2d at 586.

Three judges dissented from the denial of rehearing en banc. *See* App. 75, 925 F.2d at 587 (opinion of Oakes, C.J., joined by Newman & Cardamone, JJ.).

This Court granted ISKCON's petition for certiorari (No. 91-155) and the Port Authority's cross-petition (No. 91-339) on January 10, 1992.

SUMMARY OF ARGUMENT

Modern public airport terminals mirror the cities they serve, with spacious pedestrian walkways lined by a surprisingly varied array of shops and services aimed at attracting traveler and non-traveler alike. More than that, they are, like city streets, the paths along which journeys begin and end, connecting communities to the nation's airways, much as Main Street leads to the interstate highway. For many years, the nation's sprawling and diverse airport terminals, like municipal streets and sidewalks, have been available for expression, including the distribution of literature and the solicitation of donations by political and religious organizations.

There is considerable evidence that, for as long as there have been cities, their gates have been focal points for communication. Certainly, in this country, transportation centers—the gates to the modern city—have long been places for free expression. In the eighteenth century, the wharves were focal points for the exchange of information and ideas. The seaborne immigrants of the nineteenth century were met at Ellis Island by colporteurs of many faiths, harbingers of the pluralism of religious belief, the possibility of change and of the promise of freedom that this country held. Now, the International Arrivals Building at Kennedy Airport has supplanted the Great Hall at Ellis as the point of entry. The Court has before it representatives of the many groups that have carried on the tradition of expression in these places.

As railroads grew, their terminals became vast urban meeting halls, natural centers for religious and political expression. With the arrival of the jet age, and the explosion in air travel in the past thirty years, the airport terminals have succeeded other transportation centers of the past as places where a wide spectrum of views may be expressed to the American public and to travelers from around the world.

No court has ever approved a regulation of speech as restrictive as that advocated by the Port Authority, which would absolutely prohibit organized expression within the three New York metropolitan airports. Indeed, until the decision below, the courts had recognized that transportation facilities in general and airport terminals in particular were public fora.

Operating from that premise, the nation's airports have for many years balanced the right to free expression with the need to facilitate the airports' functions, enacting what are "in effect a set of Robert's Rules of Order," Harry Kalven, Jr., *The Concept of the Public Forum*: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 12—time, place and manner regulations that have proved effective in preventing abuse of the right to speak. In the two decades since courts first approved the distribution of literature and solicitation of donations in airports, the airport authorities have settled on an easily adaptable set of such regulations. Time has shown that limiting speakers by place and number avoids any potential for the atmosphere

of a bazaar and avoids any measurable interference with the orderly functioning of the terminal. Indeed, the Port Authority itself has had great success with such rules since before this case was filed seventeen years ago. The regulation at issue here is premised not on a specific need or interest, but upon the abstract conclusion that expression is not necessary, as the Port sees it, to fulfilling the airport's transportation function.

The panel majority below recognized the extent to which airport terminals resemble the streets and sidewalks of the cities they serve, and acknowledged as well the unbroken line of appellate authority finding that airports are public fora. Nevertheless, in an opinion marked more by vote-counting than analysis, it concluded that *United States v. Kokinda*, 110 S. Ct. 3115 (1990), compelled it to find that airports are not public fora, and that while literature distribution could not be prohibited, solicitation of contributions, speech just as much at the core of the First Amendment, could be prohibited. In reaching its result, the majority below engaged in an essentially legislative judgment, relying on distinctions the Port Authority never made.

The limitations inherent in the narrow, single-purpose sidewalk leading from a parking lot to the suburban post office in *Kokinda* are entirely absent from public airport terminals. The choice posited by the Second Circuit—between forum and function—is a false dichotomy, for history and experience demonstrate that airline terminals are important and appropriate fora for expression.

ARGUMENT

I. THE PORT AUTHORITY'S RULE SPECIFICALLY BANS FORMS OF FULLY PROTECTED SPEECH.

The Port Authority regulation is a complete prohibition of core forms of protected speech in all publicly owned and operated terminals of the three New York airports. It bans, among other things, "continuous and repetitive" (1) "sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material," and (2) "solicitation and receipt of funds."

The distribution of books, pamphlets, and other printed matter—"historic weapons in the defense of liberty"—is itself an "essential liberty" that it is "vital[ly] importan[t]" to 'protect[] . . . from every sort of infringement." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). It may not be "absolutely prohibit[ed] . . . in the streets and . . . other public places." *See Schneider v. State*, 308 U.S. 147, 162 (1939). When adherents of Krishna Consciousness distribute their scriptures in public places like the public air terminals of New York they engage in "an ago-old form of missionary evangelism—as old as the history of printing presses," that "has been a potent force in various religious movements down through the years." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (footnotes omitted).

"[T]he mere fact that religious literature is 'sold' . . . rather than 'donated,'" *Murdock*, 319 U.S. at 111, does not lessen the protection. The Court has recognized the reality that books and pamphlets are costly to produce, and that the costs cannot be expected to be absorbed indefinitely by a political or religious group. *See id.; Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944).

Solicitation for charitable and religious causes is also fully protected speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1988); *accord, id.* at 803 (Scalia, J., concuring). Solicitation "involve[s] a

variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). "Face-to-face encounter[s]" for solicitation provide a significant "opportunity for the exchange of ideas and the propagation of views," *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 798 (1985), for which there is no adequate or ready substitute.

Moreover, "without solicitation the flow of such information and advocacy would likely cease," *Schaumburg*, 444 U.S. at 632, and it might prove impossible, especially for newly-organized or underfunded groups, to print and distribute religious or political texts. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Murdock*, 319 U.S. at 111. Solicitation also requests an act that is itself expressive, a contribution to the cause. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

II. THE AIRPORT TERMINALS ARE PUBLIC PLACES FROM WHICH THE DISTRIBUTION OF LITERATURE AND SOLICITATIONS MAY NOT BE BANNED.

A. Quintessential Public Fora Are Not Limited to Streets and Parks.

In this century's classical formulation, public fora are those "streets and public places" that must be deemed to be "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.). The essence of the doctrine is that, "although parks and streets", for example "serve the diverse purpose of traffic and recreation," the municipality in whose name they are owned cannot but allow at least some public expression. Zechariah Chafee, Jr., *Free Speech in the United States* 418 (1941), including the

activities involved here, the distribution of literature and the solicitation of contributions, *see, e.g., Schneider v. State*, 308 U.S. 147, 160-61 (1939).

The public forum doctrine plays a key role in encouraging "the widest possible dissemination of information from diverse and antagonistic sources" that is "essential to the welfare of the public." *See Associated Press v. United States*, 326 U.S. 1, 20 (1943). "[T]he poorly financed causes of little people," *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943), in particular, require access to the forms of speech useful in public places. It is in the public forum that movements too impecunious or too unpopular to buy or be granted access to media like direct mail, newspapers, radio, and television can put their version of the truth out on offer, and provide competition to those with greater access to the more costly means of communication. *See* Lyn H. Lofland, *The Urban Milieu: Locales, Public Sociability, and Moral Concern, in Social Organization and Social Process* 189, 195-96 (David R. Maines ed., 1991).

These places of public movement and gathering are the most literal embodiments of the marketplace of ideas, where information of all kinds can be quickly and inexpensively exchanged, challenged, discussed. Rejected the messages may often be, but they may also prove influential, if only to one individual at a time. It is here where the latter-day cries of "Take up and read" are to be heard—cries that may make a chance listener's "countenance alter[]" and lead him "to think most intently." *Cf. The Confessions of Saint Augustine* 159 (Edward Bouverie Pusey trans., Franklin Library ed. 1982). This is the goal of speakers like the petitioners here, and, if it is achieved, the highest function of the Free Speech Clause would have been fulfilled.

The physical forms that fora assume may, of course, vary. A street would not lose its character as a forum because it is covered. Places like state-owned shopping

malls are undoubtedly public fora. *See generally Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[2]

Public fora provide marketplaces of ideas, not bazaars. Reasonable time, place and manner regulations, even-handed in formulation and application, are fully available to ensure order.

The Court has not had occasion to define the scope of the "public places" that constitute quintessential fora. The post-war years have, as has been much remarked, witnessed the decline of American downtowns, the usual locus of streets and parks, with the concomitant contraction of public space. *See, e.g.*, Forum, *Whatever Became of the Public Square?*, Harper's Mag., July 1990, at 49. "[T]he principal functions of the street" are increasingly "put[] . . . almost anywhere but on street level." William H. Whyte, *City: Rediscovering the Center* 193 (1989). Parks, too, have suffered diminished public support. *See, e.g.*, Galen Cranz, *The Politics of Park Design: A History of Urban Parks in America* 175 (1982).

Against this background, other traditional public fora have gained in both importance and visibility. Prominent among these have been major transportation centers, the most important of which today are metropolitan airports. As discussed below, the airport terminals not only serve

[2] The historical places from which the modern metaphor of "forum" derives were often enclosed places. Both the Roman forum and its antecedent the Greek agora were characterized by two-storied colonnaded buildings. Wolfgang Lotz, *Studies in Italian Renaissance Architecture* 75 (1977). The Roman basilicas traditionally adjacent to the forum itself were large, usually roofed, public structures containing markets, courthouses, covered promenades, and meeting halls. *See* William Anderson & R. Phené Spiers, *The Architecture of Greece and Rome* 192-93, 226-30 (1907). In the agora, the roofed porches of the stoas housed small shops and stores and provided the citizens with an excellent place to meet and exchange views. *See id.* at 136-39; William Dinsmoor, *The Architecture of Ancient Greece* 240-41, 262-64 (W.W. Norton 1975) (3d ed. 1950).

as transportation interfaces, but have become essential thoroughfares complementary to downtown streets.

B. The Public Spaces of Airports Are Fora by Recent Convention and by Tradition.

The primary category of public fora consists of places "clearly held in trust, either by tradition or recent convention, for the use of the public at large." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984). Major airports like those at issue here fit well within both descriptions.

"Traditional"[3] fora are generally "public thoroughfare[s]," including "open spaces, . . . meeting hall[s], park[s], [or] street corner[s]." *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion); *see also United States v. Kokinda*, 110 S.Ct. 3115, 3120 (1990) (plurality opinion); *Greer v. Spock*, 424 U.S. 828, 835 (1976).

The terminals of the three New York areas are unquestionably public thoroughfares. They "possess," as the district court recognized, "the characteristics of a bustling metropolitan boulevard." App. 40, 721 F. Supp. at 576. " 'Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information.' " *Id.* Airports circulate people and ideas from around the country and the world. Few, if any, places in the fragmented culture

[3] "Tradition" hardly entails immutability. "We should realize from the beginning that a completely stable or rigid tradition that never admits change is humanly impossible and has never existed." Paul Oskar Kristeller, *"Creativity" and "Tradition,"* 44 J. Hist. Ideas 105, 112 (1963).

of contemporary American society compare with airports as a point of access to such a breadth of cultures and information.

The courts have always understood that major transportation terminals, including airports, are public thoroughfares from which classic expressive activities like those proposed by petitioners here may not be prohibited. Indeed, the notion that airports, as much as streets, are places where the public expects to encounter these activities is embedded in current popular culture.

The seminal case on the subject struck down the policy of the Port Authority to deny access to its bus terminal to those seeking to use it as a forum for expression. *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 88 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). As a "thoroughfare used by thousands of people each day," and with a "main concourse resembl[ing] a street," *id* at 89, "[t]he Terminal building is an appropriate place for expressing one's views . . .," *id.* at 90.

The year before *Wolin*, the California Supreme Court had held that expressive activities could not be barred from railroad stations. *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Ctl. Rptr. 97 (1967). *Wolin* and *Hoffman* thus clarified the "[p]ublic forum status" of "municipal bus terminals and railroad stations." *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 313 n.4 (1974) (Brennan, J., joined by Stewart, Marshall & Powell, JJ., dissenting).

From those holdings it was a short and clearly marked step to the conclusion that public airport terminals must also be available for expressive activity. There quickly developed an "unusual consensus of judicial, legislative, and administrative opinion [that] would classify the public areas of [airports] . . . squarely within the public forum family." *U.S. S.W. Afr./Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983).[4]

The judicial arena displays an almost unbroken line of cases, from the earliest, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), to the most recent, *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 774 F. Supp. 977 (D.S.C. 1991). The Eighth Circuit reported in 1987 that "every court that has decided the issue has held that an airport is a public forum," *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283, (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), and the Fifth Circuit, six years before that, noted that the result "is now generally well established," *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). Most of the litigation occurred between 1974 and 1978. The result was that the literature distribution and funds solicitation has become accepted practice in airports across the country.[5] The presence of distributors and solicitors is a familiar and expected feature of airports' bustling and cosmopolitan ambiance.[6]

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[4] This consensus has reached across international borders. In *Committee for Can. v. The Queen*, 1 S.C.R. 139 (Can. 1991), the Supreme Court of Canada affirmed that a ban on expression at Dorval Airport in Montreal violated the Canadian Charter of Rights and Freedoms. "But, train and airport terminals are indeed modern boulevards, extension of Main Street. The list of sites traditionally associated with speech is not static. As means of locomotion progress, people shall begin to gather in areas heretofore unknown." *Id.* at 206 (opinion of L'Heureux-Dubé, J.).

[5] See Table A for a more complete list of cases in which the public forum status of airports has been raised.

[6] When Boris Yeltsin—then in the Soviet opposition—arrived at JFK in 1989 for a United States visit, he received what the Associated Press tellingly described as "a taste of Western life—a greeting from a Hare Krishna follower who gave him two books and two roses." Poughkeepsie J., Sept. 10, 1989, at 3A.

The recognition has proceeded from the courts' understanding of the essential similarity of metropolitan airport terminals and accepted public fora, like streets. *See, e.g., Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Fernandes*, 663 F.2d at 627; *U.S. Southwest Africa*, 708 F.2d at 764; *Jamison*, 828 F.2d at 1283.

In 1980, Congress required the FAA—the agency that oversees airports and directly controls National and Dulles airports—to promulgate regulations regarding "access to public areas [in National and Dulles] by individuals or by religious and nonprofit organizations . . . for the purpose of soliciting funds and distributing materials." 49 U.S.C. app. § 1359(a) (1988). In the course of debate, Senator Morgan observed:

> The reality is that other airports have seen fit to create moderate, specific regulations to allow proper exercise of First Amendment rights, while protecting the ability of passengers to move freely and unhindered through public facilities.

125 Cong. Rec. S9174 (daily ed. May 1, 1979).

In carrying out the mandate, the FAA observed that "large portions of the airport buildings at National and Dulles were designed for and are open to the general public," and that "[t]here is a considerable amount of social and commercial interchange in the terminals." The agency concluded that, "in many respects, the terminals are like any other public thoroughfare where there is no question" that distribution of literature and solicitation of contributions is appropriate. 45 Fed. Reg. 35,314 (1980). The resulting regulations, 14 C.F.R. §§ 159.91, 159.93, 159.94 (1991), allow these activities, subject to a set of time, place and manner rules analogous to those adopted by many other airports across the country, *see infra* pp. 39-41.

C. Airport Terminals Are Descendents of Transportation Centers Historically Regarded as Fora.

1. *Transportation centers have historically been meeting places and places for the exchange of ideas.*

The human landscape has, throughout history, been defined by transportation routes. *See* 1 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, at 276-77 (Siân Reynolds trans., 1972). At the "halts" in these routes arose towns, *id.* at 277, and within the towns, the "nodal points" from which the modes of transport emanate. "The city, Lewis Mumford once observed, sits like a spider in the midst of its transportation web." Willfred Owen, *Transportation and World Development* 54 (1987). As new transportation routes were created and new means of transportation devised, new entryways to cities—and new kinds of public places—came into being. *See* K.H. Schaeffer & Elliott Sclar, *Access for All: Transportation and Urban Growth* 14 (1975) ("distinct new urban settlements" were created at areas outside city gates, as the need for protection diminished).

Transportation junctions have naturally evolved as centers of communication for both physical and psychological reasons. Not only do they concentrate people arriving from and departing to other points, but "[b]ecause decisions must be made at junctions, people heighten their attention at such places and perceive nearby elements with more than normal clarity." Kevin Lynch, *The Image of the City* 72-73 (1960).

In the American context, wharves and railroads served into this century as transportation hubs. *See* Steve Izenour, *La Ville Américaine et ses Portes, in Les Portes de la Ville* (Chantal Noël ed., 1983). Both predictably developed into places where not only goods, but ideas, were exchanged.

In the early years of our national development "the only practical means of transport was by water; therefore, the development of the country was coastal. The principal cities of the day were Boston, Providence, New York, Philadelphia, and Baltimore—all possessing excellent deep-water ports." Charles Froesch & Walther Prokosch, *Airport Planning* 2 (1946). The ports were "information 'hothouses,'" whose "high density and overlapping quality of information networks carried information efficiently and helped integrate the diverse elements of the community." Richard D. Brown, *Knowledge is Power: The Diffusion of Information in Early America, 1700-1865*, at 129, 131 (1989).

In the eighteenth century, with printing still a relatively slow process, face-to-face communication was the paramount means by which to keep abreast of news, commercial data, and social currents. *Id.* at 114.[7] The wharves were a principal focus of these interchanges. *See id.* at 112. In the words of Thomas Nelson, a Philadelphia merchant, one would simply to "'walk[] down Town by the Wharves'" to obtain and exchange information. *Id.* at 114.

The phenomenon continued well into the nineteenth century. At the port of San Francisco, for instance "[t]he waterfront was the scene of all sorts of public events . . . . Market Street Wharf and the other wharves to the north of it were not only landing places, but also served as business streets." John H. Kemble, *San Francisco Bay: A Pictorial Maritime History* 16 (1957).

Missionaries early discovered that particularly important work was to be done at transportation centers. The American Tract Society's colporteurs—evangelists selling

[7] Printing was, of course, significant. For example, in 1776, Thomas Paine spent considerable time at Perth Amboy, New Jersey, personally selling copies of *Common Sense*, and leaving with the not inconsiderable sum of $48. David Freeman Hawke, *Paine* 57-58 (1974).

bibles and religious pamphlets—made thousands of visits to steamboats and railroads, and it was their aim to "reach[] all the prominent thoroughfares of the country, so that every traveler for business or pleasure should be made to feel that his spiritual needs are cared for, and that the claims of God meet him at every turn in the road of his pilgrimage." American Tract Society, *Twenty-Fifth Annual Report* 67 (New York, American Tract Society 1850).[8] Travelers, it was found, were receptive to the Society's messages. "'Travelers when away from home, and among strangers, often cast off the fear of God and devote their leisure hours to reading bad books, and need to be reminded that the eye of the omniscient God is upon them, and that they are hastening to that bourne from which no traveler returns.'" American Tract Society, *Twenty-Sixth Annual Report* 57 (New York, American Tract Soc'y 1851).

The American Tract Society, founded in 1825 by merger of a number of small tract publishers of various Protestant denominations, adopted in 1841 the Reformation-era practice of colportage. The Society's agents were given the job of selling books and, at the same time, striking up conversations about religion, with a view to converting their customers. These practices, similar to ISKCON's practice of *sankirtan*, also took them into as many public places as possible. James T. Siburt, *Tennessee Colporteurs: Flatboat Evangelism*, 47 Tenn. Hist. Q. 227, 228 (1988).

[8] The colporteurs seemed ubiquitous at transportation sites. They "ministered among sailors in the major harbors, on the canals, and aboard rafts and river boats in the Mississippi." Stephen Elmer Slocum, Jr., The American Tract Society: 1825-1975, An Evangelical Effort to Influence the Religious and Moral Life of the United States 91 (1975) (unpublished Ph.D. dissertation, New York University). They even appeared at wagon-train trailheads. On May 12, 1846, an American Tract Society agent handed out scriptures to every person in the ill-fated Donner Party when it departed from Independence, Missouri. *Id.* at 6

The public wharves were an important locale for reaching these audiences. The Tract Society sought " 'to distribute tracts and books among the thousands of flatboatmen and raftmen landing at these ports, and the crews of the steamboats,' " and its colporteurs were " 'instructed to furnish every immigrant landing at the wharves, whom they can reach, with an evangelical book or tract.' " *Id.* Preachers were a common sight at the boat-landings of New York. Harper's Wkly., Oct. 21, 1871, at 998.

Organizations like the American Tract Society were part of the winds of change that swept across the religious landscape in the nineteenth century. Many groups, including the Baptists, the Adventists, and the Methodists, also went directly to the grass roots through massive circulation of printed materials, often successfully challenging the more established denominations of the day. *See* Nathan O. Hatch, *The Democratization of American Christianity* 141-46 (1989). These results were achieved in large measure through the distribution of literature in all available places, so that it "found its way into every nook and corner of the land." William Warren Sweet, *The Story of Religion in America* 254 (1950).

New York's, and the Nation's, first "international arrivals buildings" were Ellis Island and its predecessors as immigration centers, Castle Garden and the Barge Office. Then as now, "New York is in touch with all the world," and "is the chief gateway through which the immigrant passes, coming from every clime under the sun." New York Bible Soc'y, *Seventy-Eighth Annual Report* 10 (1902). In the evangelists' view, "[e]very port of entry for immigrants in the United States is a natural distributing point. . . ." *The Bible at Two Southern Ports*, Am. Bible Soc'y Rec., Mar. 1914, at 36. Kennedy Airport, as the country's principal international point of entry, is in many ways the current equivalent of these marine depots of yore.

Religious book distributors were among the first people the new arrivals encountered at Castle Garden. *See* Harper's Wkly., May 29, 1880, at 342. At Castle Garden, agents of the New York Bible Society were "able to mingle with larger numbers of emigrants than they could meet in the boarding houses, in the streets, and on the wharves." New York Bible Soc'y, *Thirty-Second Annual Report* 12 (New York, New York Bible Society 1855). Its missionary work at Castle Garden was said to be "unsurpassed in opportunities for doing good," New York Bible Soc'y, *Fifty-Sixth Annual Report* 27 (New York, New York Bible Society 1879-80), and many immigrants were reported to have been "moved to tears" when presented with religious books, New York Bible Soc'y, *Sixty-Third Annual Report* 8 (New York, New York Bible Society 1886-87).

By 1908, forty-one missionary and similar organizations had established a presence on Ellis Island. Mary J. Shapiro, *Gateway to Liberty* 152 (1986). These included evangelical groups and other religiously-based organizations like the Young Women's Christian Association and its offshoot, the Travelers' Aid Society. Lise Hirschberg, The Chain of Protection: Social Work on Ellis Island in the 1920's, Paper Presented at the Fourth Annual Conference on Immigration to New York, New-York Historical Society 9 (May 16-17, 1986). Those landing at Ellis Island were greeted with bibles and other religious books, as well as political materials like a manual issued by the Daughters of the American Revolution. 1 *Statue of Liberty/Ellis Island National Monument Historical Resources Study* 904-05 (National Park Service 1984). The New York Bible Society, for example, had as a goal "to distribute God's Book among all sorts and classes in the city, in all accessible places, among all the immigrants of every race passing through Ellis Island, and upon vessels of every description in the harbor." New York Bible Soc'y, *Seventy-Eighth Annual Report*, *supra*, at 11.

The coming of rail did not diminish the phenomenon of transportation gateways as centers of communication. "Just as the crossing of two roads from earliest times, has been the start of many a village, so the crossing of two railroads has been a highly strategic factor in the development of cities." Froesch & Prokosch, *supra*, at 2.[9] The railroad station in particular was the central public space around which sizeable towns—Atlanta, Dallas, and Denver, for example—were built. H. McKinley Conway, *The Airport City and the Future Intermodal Transportation System* 2 (1977). Even rural "depot[s] became a type of social center." H. Roger Grant, *The Country Railroad Station in America* 8 (1978). Stations like Reading Terminal in Philadelphia, built in 1893, which incorporated a well known restaurant and, underneath it, a market, were designed to attract not only travelers but other visitors as well. *See* Edwin P. Alexander, *Down at the Depot: American Railroad Stations from 1831 to 1920*, at 272 (1970). The great metropolitan railroad station, like Grand Central Terminal or the old Pennsylvania Station, was a "micro-city, with shops, restaurants, lunch counters, bars, bookstores, communication centers, offices, first-aid stations, bootblacks, panhandlers, and pimps"—in short, "almost a microcosm of the unsleeping city." 2 Carl S. Condit, *The Port of New York* 161, 160 (1981).[10] Grand Central, moreover, functioned "as sort of a public hall for New York." William O. Middleton, *Grand Central* 119 (1977).

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[9] Indeed, "[m]any suburban communities have grown and flourished around [a single] railroad station." *Id.* at 18.

[10] Grand Central Station—called by a "Red Cap preacher" "'a parish—a big one too; and a mighty good one,'" David Marshall, *Grand Central* 112 (1946)—became in the 1940's a site for missionary work and religious meetings. *See* Samuel M. Shoemaker, *The Most Unforgettable Character I've Met: Red Cap No. 42*, Reader's Dig., Feb. 1946, at 51.

From the beginning, railroad stations were places where "people met and mingled, where books and newspapers were delivered, where goods and foodstuffs arrived." Jeffrey Richards & John M. MacKenzie, *The Railway Station: A Social History* 2 (1986). The human complexities inherent in the idea of travel ensured that the station could not be simply a one-dimensional utility. It was, instead, "truly a gateway through which people passed in endless profusion on a variety of missions—a place of motion and emotion, arrival and departure, joy and sorrow, parting and reunion." *Id.* at 7. The natural consequence was that stations have always functioned as platforms for communication,[11] not the least of which was whistle-stop politicking, including major political speeches inside the stations. *See id.* at 125.[12]

As "an entrance to a city," Paul Goldberger, *Design Notebook*, N.Y. Times, Mar 23, 1978, at C10,[13] the airport has continued this tradition largely displacing railroad stations as vital "city nodes." *See* Lynch, *supra*, at

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[11] Beginning in 1891, Baptist organizations built and put into service "chapel cars"—"movable church buildings which could be hauled over railroads"—on trains throughout the country. Charles Herbert Rust, *The Evolution of the Chapel Car Movement* (American Baptist Publication Soc'y, n.d.) Earlier, in 1878, the American Bible Society had undertaken a larger scale program of bibles in trains, resulting, it was said, in conversions and in reducing the "demand for low literature." Eugene H. Pierre, *Apostolate of the Railway*, Bible Soc'y Rec., June 1873, at 90.

[12] Bus stations were also used for mass distribution of religious writings. Ralph W. Bayless, *Scripture Distribution at Bus Depots*, American Bible Soc'y Rec., Dec. 1951, at 154; *1988 Yearbook of Jehovah's Witnesses* 50.

[13] *See also Winged Victories*, Architectural Rec., June 1989, at 130 (Harrisburg International Airport described "as a dignified civic gateway to the Pennsylvania state capital"); Greg Irsfeld, *Airports Use Art To Enhance Terminals, Community Relations*, Airport Services, May 1989, at 20 (Nashville International Airport "a gateway to the community" [hereinafter *Airports Use Art*]).

74-75. Like the wharf and train station [14] before it, the airport "has done more than provide a carrier service. It has affected our economic way of life, it has made changes in our social viewpoints, and it has had a hand in shaping the course of political history." Robert Horonjeff & Francis X. McKelvey, *Planning and Design of Airports* 1-2 (3d ed. 1983).

Airports "are important to the growth of business and industry," Systems Planning Div., Federal Aviation Admin., *The Airport—Its Influence on the Community Economy* at 1 (1967), and have become cities "unto themselves." *Id.*[15] Unlike management of a suburban post office,

> airport management . . . must operate such typical city services as fire protection, emergency medical, police and security services, and in many cases, a water system, sewage treatment system and communications system. At the same time, the administration must deal with concessions, ground transport and maintenance of buildings and grounds—all for a 'city' having a daily population greater than most . . . cities.

Id.

The airport is also "very important in the present and future life of a town, because it connects the two with

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[14] The historical link between rail and air is reflected in airport architecture. Helmut Jahn's United Airlines Terminal at O'Hare International Airport, for example, is an "evocation of the soaring iron and glass pavilions of the great Victorian railway stations." *The Temple of Marketing*, New Republic, Oct. 26, 1987, at 25. Similarly, the passenger terminal building at Harrisburg International Airport highlights "the earthbound model of the classic railroad station." *Back to the Future*, Architectural Rec., June 1989, at 138.

[15] This trend began shortly after World War II. As the normal growth of cities swelled, "the city grew out toward the airport. Concurrently, the airport itself drew people and businesses. Even industries grew up around the airport." Edward G. Blankenship, *The Airport Architecture—Urban Integration—Ecological Problems* 10 (1974).

the world at large and links it to the general progress of the whole community." Henry V. Hubbard et al., *Airports: Their Location, Administration and Legal Basis* 3 (1930). The airport is "the door to the community through which pass all manner of people and ideas." Coffey, *Editorial Comment*, Airport Services, May 1977, at 10, 11.

The New York airports are archetypal. JFK is "[l]ike a seaport city of old." George Scullin, *International Airport* 13 (1968). It is "a World Center." *Id.* at 4. "Working in unison," JFK, LaGuardia and Newark, "become[] not only the gateway to the world but the crossroads of the world." *Id.* at 27.

2. *The general circulation areas of the terminals are public thoroughfares.*

The public concourses of JFK, LaGuardia and Newark, not to speak of airports nationwide, are vital thoroughfares, "an interface between modes of transportation." Edward G. Blankenship, *The Airport: Architecture—Urban Integration—Ecological Problems* 28 (1974). "With literally thousands of people entering and leaving the city along its concourses daily, it is only natural evolution for the airport to spawn [what] [w]e call . . . the 'Second City', a miniature replica of its downtown namesake in almost every respect." Edward Knevals. *The Airport: Second City* 3 (1967).

Passenger terminals are specifically designed to function as public thoroughfares. They contain appurtenances and services like those in urban commercial areas, including "lobbies . . . office space, concessions, newsstands, restaurants, and government . . . management facilities." Blankenship, *supra*, at 28. More than one billion people pass through airport terminals each year. *See* Ira Weinstein & Juliette Madrigal, *Airport Customers and Their Needs for the 1990s*, Airport Services, May/June 1991, at 18. For many, the journey down the concourse is "a

diverting promenade along a palm-bordered avenue where gateside lounges are interspersed with clusters of shops and restaurants, sidewalk cafés and parks, flower-banked terraces and shaded nooks." *A Sense of Place*, Architectural Rec., June 1989, at 135.

Retail establishments "are currently one of the most active areas of change in the airport facility." G.F. Doughty, *Review of Passenger Service Issues at Airports, in Airports for People* 9 (1988). Planners emphasize "elaborate retail facilities," *Winged Victories*, Architectural Rec., June 1989, at 130, as essential to the airport plan, *see, e.g.*, Paul H. Wright & Norman J. Ashford, *Transportation Engineering* 622, 634 (1989). This "striking trend[]," *Winged Victories, supra*, at 130, has transformed the terminal concourse into "main street U.S.A.," Greg Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, at 40 [hereinafter *Airport Concessions*]. The integration of airports and their communities is signaled by the fact that the prices of retail goods in airport stores must compete with off-airport prices. *See Airport Concessions, supra*, at 41; Laurie McGinley, *Airports Try To Ease The Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B4.

The products offered in airports, moreover, "are no longer limited to typical newsstands and fast-food items. Gourmet dining, up-scale apparel shops, and specialty foods . . . are becoming commonplace." Doughty, *supra*, at 9. "Quality stores offering high fashion brand names have discovered the willingness of passengers to pay for their products," and "sales at airport shops have boomed in recent years." *Id.*[16] And, in many parts of the nation, "the airport is the ideal outlet for local industry

[16] For example, "[e]ncouraged by the success of their two stores at John F. Kennedy International Airport, officials at Bloomingdales' . . . plan to open four more stores in airports this year and seven next year." McGinley, *supra*, at B4.

to market its wares to high flying businessmen and affluent tourists." *Id.*[17]

National Airport has installed a $16 million food court and retail shopping area including popular retailers like Vie de France, Crabtree & Evelyn, McDonald's, Chez Chocolate, Benjamin Brooks, and two Smithsonian Museum shops. *Airport Concessions, supra*, at 42. In developing the Washington National marketing plan, airport administrators "wandered around commercial complexes . . ., places where passengers go when they are not at the airport," in order to "make the airport resemble a shopping mall." *Id.*

The three metropolitan New York airports are part of this phenomenon. By itself, the IAB is "equipped with all the conveniences one expects to find in a modern city." Roy Allen, *Great Airports of the World* 73 (1964). The IAB, however, is only one of many areas in the airports that closely correspond to busy city thoroughfares. The terminal buildings house pedestrian walkways, retail stores, banks, drug stores, nurseries, bars, restaurants, newstands, gift shops, medical offices, post offices, advertising displays, telegraph, insurance and car rental locations, and book stores. The IAB even contains an "impressive" art gallery established in 1969 that exhibits works of Miró, Picasso, Calder, and Dalí, among others. Suzanne Carmichael, *Stuck at the Airport? Then Look at the Art*, N.Y. Times, Dec. 15, 1991, § 5 (Travel), at 8. With hotels, chapels, and department stores on the premises, the airport complexes are mirrors of the immense urban agglomeration they serve.

Airport visitors "want all the services and amenities they can get." Lloyd Gite, *Your Ticket To High-Flying*

[17] Portland International Airport, for example, offers an "Oregon Market" designed "to reflect a local flavor." *Airport Concessions, supra*, at 40. The "refurbished commercial court . . . showcases products of the Pacific Northwest . . ." *Winged Victories, supra*, at 130.

Profits, Black Enterprise, Mar. 1991, at 56. Airports are responding by providing more and more kinds of facilities in their terminals that are usually found outside them. In Washington National, a traveler may purchase "a sandwich, some cole slaw or potato salad, maybe a six-pack of beer or some wine," *Airport Concessions*, *supra*, at 42, at a baggage-level gourmet delicatessen instead of at the corner market. Similarly, "meeters and greeters," who compromise "[t]he majority of airport customers," Weinstein & Madrigal, *supra*, at 19, "spend a lot of time in the airport, an average of 65 minutes, and they don't come . . . just for hugs and kisses," *id.* To the contrary, "[t]hose seeing travelers off come to have a meal and chat with departing passengers. Those meeting arriving passengers come to the airport early and browse, shop and snack." *Id.*

"Community objectives" are a fundamental part of the airport plan. Airports design passenger terminals that "[r]ender a unique and appropriate expression of the community", Horonjeff & McKelvey, *supra*, at 332, in order to attract non-travelers. Thus, "the most impressive interior space in the . . . main terminal at Palm Beach International is . . . a 600-foot-long-barrel-vaulted 'concession mall' lined with national fast-food outlets, a 'white-tablecloth' restaurant, and upscale shops that reflect the Florida resort city's high-toned image." *Id.* The steel-and-glass atrium at Milwaukee "features, among other shops, an excellent bookstore that attracts customers who have no intention of flying." *Winged Victories*, *supra*, at 130. At Washington National, "Anton's Bar and Grill . . . is a popular nightspot" with locals because of its security, anonymity, food, cocktails, "and if you don't like another customer, 'all you have to say is, "Sorry, got to catch a plane."' " McGinley, *supra*, at B4.

Non-travelers also visit airports to see art. Airport officials explain that "displaying works of art in their terminals . . . serves as a good marketing tool

that helps generate public support for their facilities." *Airports Use Art*, *supra*, at 20. San Francisco International spends $1 million annually on its "heralded" art. "Art hangs on corridor walls and in waiting areas, dangles over escalators and moving sidewalks, and lodges in cases along the walls of the tunnels that link the three terminals." Carmichael, *supra*, at 8. The temporary exhibits, which are coordinated by a full-time curator, "have set the standard for other airports. At any time, up to 11 shows are displayed at various locations." *Id.* at 9.

At Orlando International, works are "located throughout the terminal." *Airports Use Art*, *supra*, at 22. In a "project tying the airport with the arts, the aviation authority and airport concessionaires jointly sponsor an annual arts festival," which airport officials describe as a "good way to bring people into the airport." *Id.* Its purpose "is geared to the airport as a community center," and during the show free parking is provided for festival goers. *Id.*[18]

Architectural landmarks also attract non-travelers to the airport. JFK, "a place of absorbing interest," Allen, *supra*, at 71, features "[]the fantastic T.W.A. Flight Centre designed by Eero Saarinen," *id.* at 74, as well as "buildings by star second-generation Modernists" like I.M. Pei, Skidmore, Owings & Merrill and Edward Durrell Stone. *The Temple of Marketing*, New Republic, Oct. 26, 1987, at 26. O'Hare International boasts Helmut Jahn's "Terminal of Tomorrow," *id.* at 25, which, "with

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[18] Orlando Airport also sponsors orchestral performances during the year, as well as small "environmental groups" who perform "throughout the terminal." *Id.* at 22. Similarly, Nashville International brings in art exhibits "to display at the airport that reflect all the region's arts, along with national and international exhibits to provide people access to major art works." *Id.* The Nashville program also includes roving and stationary musical groups (ranging from Bluegrass to Dixieland, but with a sprinkle of classical music and opera) and mimes, who each Friday from noon to 2 p.m. perform "in the public areas of the airport." *Id.*

its dramatic glass-roofed gate concourses and subterranean sound-and-light show, has transformed the nation's busiest airport into a kinetic monument to American mobility." *Winged Victories*, *supra*, at 130. These monuments are throwbacks to the period "following World War II, when . . . [c]ommunities viewed their airports as a source of civic pride, and even people who couldn't afford a trip to Miami came out to the airport just for the thrill of watching those who could." *Id.*

Airport officials also encourage many expressive activities. At JFK, celebrities, "arriving or departing from the field . . . draw their peculiar brand of fans or fanatics." Scullin, *supra*, at 14. "[B]ecause of the presence of the United Nations . . . controversial political figures" regularly draw crowds of protesters and supporters. *Id.*

"On the other hand, . . . all prominent politicians up for reelection enjoy the exposure to the crowds, the press, and the TV cameras" that gravitate to airports. *Id.* Politicians did so in record numbers during the 1988 presidential primary campaign, when candidates

> tried to augment their advertising dollars by staging media events near major airports. Prominent in the campaign were fly-ins, where the candidate would touch down at an airport and be greeted by a clutch of local party officials, campaign workers, and reporters. The candidate would make 'the speech' to the cheering enthusiasts, mingle briefly with the crowd, and with a hearty wave at the top of steps, disappear back into the campaign airplane to fly to the next event.

Laurence W. Moreland et al., *The 1988 Presidential Election in the South* 8 (1991). The 1988 campaign was a "Tarmac Campaign," with candidates "hopping from airport to airport to hold press conferences and get a few minutes of local news coverage." William Schneider, *Class Conflict, Countryfolk and a Choir of Candidates*, L.A. Times, Mar. 6 1988, § V (Opinion), at 1.[19]

With the advent of "Super Tuesday," candidates have thus "come to view the nation as an interchangeable sequence of airports, access roads and motel meeting rooms." Walter Shapiro, *Hello, I Must Be Going*, Time, Mar. 7, 1988, at 20. There is simply no "time . . . to walk down many main streets or discuss issues over dessert and coffee in many living rooms." Moreland, *supra*, at A14.[20] Instead, "satellite hookups, demographic studies, airport press conferences and shrewd purchases of TV advertising time will replace house-to-house canvassing, stops in roadside cafes and saturation advertising as the key tactical elements of the presidential campaign." Thomas B. Rosenthal, *Campaigning Now Subtle Exercise in Demographics*, L.A. Times, Feb. 21, 1988, at A1.

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[19] As are many "grand political" schemes, the strategy of "hangar-to-hangar combat was born of necessity." Andrew Rosenthal, *Candidates Can Land on TV Just by Landing*, N.Y. Times, Mar. 3, 1988, at D23. The presidential aspirant Gary Hart, fresh from an unanticipated victory in the 1984 New Hampshire primary, "saw a sudden opportunity to win the South, even without organization. So he flew from one airport press conference to another." *Id.*

[20] The campaign of Senator Dole is a case in point. In one "frenzied" three-day period preceding Super Tuesday, Sen. Dole "touched down at five separate airports in Minnesota, four in South Carolina, plus one each in North Dakota, South Dakota, Missouri, Oklahoma, North Carolina, and Florida." Shapiro, *supra*, at 20. His entire campaign in Oklahoma lasted 83 minutes, and was highlighted by nine television cameras that "chronicled his arrival in Oklahoma City, as he strolled across the airport tarmac, climbed a flight of stairs and held a press conference." *Id.* In South Carolina, where Dole spent almost an entire day, he left an airport only once. "Typical of this hello-I-must-be-going style of stumping was the press conference in the airport lobby in Florence, with the fuselage of his campaign plane clearly visible through a wall of windows." *Id.*

D. The Public Forum Status of Airports Is Consistent With *United States v. Kokinda.*

The majority below did not expressly find the airport terminals to be nonpublic fora. It did, however, count five votes in *United States v. Kokinda*, 110 S. Ct. 3115 (1990) —which involved a restriction *only* on solicitation and in which there is no opinion for the Court—to uphold the Port Authority's ban on solicitation and to strike down the ban on literature distribution. That result was to create a distinction that the Port Authority—the legislator of the rule—never made and has never defended. For that among other reasons, it does not follow from *Kokinda* that a ban on solicitations, not to mention other expressive activities such as literature distribution, in the general circulation areas of a major metropolitan airport is justified.

Most obvious, of course, is the vast architectural gulf between the walkway in *Kokinda* and the public areas of JFK, LaGuardia and Newark airports. The site in *Kokinda* was a narrow walkway "leading only from the parking area to the front door" of a suburban post office. 110 S. Ct. at 3120. There is simply no comparison between that essentially one-dimensional strip and sprawling complexes like the New York airport terminals, which contain postal facilities as well as countless other amenities.

The cul-de-sac walkway in *Kokinda* was not "a thoroughfare" and did not exist to facilitate the daily commerce and life of the city. *Id.* The opposite is true of the public spaces of an airport complex that advertises itself as the "gateway to the world."

The airports' lobbies, corridors, and public spaces, as has been discussed, are thoroughfares, enabling travel to, from, and through the New York metropolitan area. The airports not only "facilitate . . . daily commerce and life," 110 S. Ct. at 3120, but commerce and life in American urban centers would be unimaginable without them. When the court below declared that "the Port Authority's terminals are remote from pedestrian thoroughfares," App. 12, 925 F.2d at 581, it ignored not only the fact that the airports are intimately interconnected with the metropolitan area's street system, JA 382, but that the terminals are themselves "pedestrian thoroughfares" of considerable significance.

The court of appeals also relied on the belief that "[p]ersons using the passageways in terminals are not there to meet a friend for lunch, window shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." App. 12-13, 925 F.2d at 581. On the contrary, the tens of millions of people who gather in and travel through the airports each year, many with time on their hands, do precisely the same things as they would do in "typical downtown streets." The court recognized that "the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street." App. 11, 925 F.2d at 581. But the New York airports are not, as might be gathered from that remark, Potemkin villages. The commercial establishments, art exhibits, and other urban appurtenances are very real and serve the same functions as they do in a "busy downtown street"—providing the material necessities and amenities of quotidian pursuits, as well as places for entertainment, edification and high-tech political campaigning.

Nor can much weight be placed on an analogy between post offices and airports as "proprietary" governmental enterprises. A suburban post office, like the state liquor stores found in New Hampshire or Pennsylvania, does resemble, in all but ownership, a free-standing, single-purpose, private enterprise to which the public is invited for business.

These airports are very different. The airports—operated by the Port Authority as "an essential governmental function," N.Y. Unconsol. Law § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:4 (West 1990)—are not proprietary in the sense indicated by the plurality in *Kokinda* and in the case it cited, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). The government here does not directly sell goods and services to the public as it did when it operated the post office in *Kokinda* and the bus in *Lehman*. Rather, as when it builds and maintains public streets, the government provides a broad-based environment within which private businesses may operate and at which the public is encouraged to wander at will and to spend time and money at the vast array of available facilities.

E. In Traditional Public Fora, Literature Distribution and Solicitation May Not Be Banned.

The Port Authority has not claimed that its ban on distribution and solicitation is a time, place, and manner regulation. Nor could it do so, for its rule is "an absolute prohibition on a particular type of expression." *United States v. Grace*, 461 U.S. 171, 177 (1983). This rule is invalid in a forum unless it is, at the least, "narrowly drawn to accomplish a compelling governmental interest." *Id.* The rule cannot pass this stringent scrutiny.

The Port Authority has not asserted otherwise, for it has premised its justification for the rule entirely on the hypothesis that the New York airport terminals are not public fora at all. Indeed, the Court has often made clear that certain kinds of "generally directed means of communication"—including, at least, literature distribution and solicitation—"may not be completely banned" in traditional public fora. *See Frisby v. Schultz*, 487 U.S. 474, 486 (1988).

For example, in a fair—a "limited" public forum—though "[t]he flow of the crowd and the demands of

safety are more pressing" than in a street or a park—the state may not "unnecessarily limit" the "right of every citizen to 'reach the minds of willing listeners,'" and must provide the "'opportunity to win their attention.'" *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 651, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

While the rule upheld in *Heffron* confined to a fixed location the solicitation of funds and the distribution and sale of literature, it permitted solicitation and distribution at a place "within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass." *Id.* n.16. Thus the plaintiffs were enabled "to conduct any desired activity *at some point within the forum.*" *Id.* at 655 (emphasis added).

In any event, as discussed below, the justifications the Port proffers for its ban are insufficient even for a non-public forum. *See infra* pp. 44-47. By any standard, therefore, the challenged rule is invalid.

III. REASONABLE TIME, PLACE, AND MANNER RULES ARE AVAILABLE TO ASSURE THE ORDERLY ADMINISTRATION OF AIRPORT TERMINALS WHILE PRESERVING RIGHTS OF EXPRESSION.

Two decades' experience demonstrates that expressive activities coexist easily with the commercial and transportation functions of airports, as they do with those of streets. Recognizing airports' "valid concerns . . . to expedite the processing of travelers, to maintain a free and orderly flow of traffic, and to avoid disruption of normal airport activities," *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978), the courts have upheld regulations that are narrowly tailored to further these interests.

Regulations upheld for the Chicago airports include restricting expressive activities from specified areas in

which "airport officials are concerned about security measures (*e.g.* the hijack, search, and security areas), locations in which travelers become part of a captive audience (*e.g.*, persons in line), or locations in which space is limited (*e.g.*, doorways, escalators)," *id.* at 268, prohibiting the erection of tables and other structures, *id.* at 270, and permitting closure for periods of unusual congestion and emergency security measures, *id.* at 270-71. The Pittsburgh airports were held to have validly enacted, among other things, similar place retrictions and a ceiling on the total number of distributors and solicitors permitted at any one time. *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 671 (W.D. Pa. 1977). The Fifth Circuit upheld the Atlanta airport's imposition of "solicitation booths" for the receipt of contributions. *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 826-30 (5th Cir. 1979). The Miami airport enforces "designated First Amendment Zones," even within which further restrictions apply. *See International Caucus of Labor Committees v. Metropolitan Dade County*, 724 F. Supp. 917, 919 (S.D. Fla. 1989).

The permit system for National and Dulles Airports, in place, unchallenged, for over a decade, assures that the "solicitors or distributors of literature not exceed a number which would aggravate existing congestion." 45 Fed. Reg. at 35,315. In addition, solicitation or distribution may not be conducted near places that pose problems of congestion or security. *See* 14 C.F.R. § 159.94(d) (1991). Thus the FAA seeks to "provide[] the maximum freedom of movement to leafletters and solicitors" while preserving "the rights of others using the airports." 45 Fed. Reg. at 35,315.

Examples of this kind of regulation could be multiplied almost indefinitely. *See, e.g.*, cases cited in Table A, para. 4. The point is that, while the tradition of allowing distribution and solicitation at airports has become in-

grained, airports have been able to respond effectively to local conditions with appropriate restrictions.

Indeed, the Port has effectuated a similar régime at these very airports since 1975. JA 462. According to the Port, these "time, place, and manner restrictions," JA 469, "g[a]ve those engaged in the non-commercial distribution of literature and solicitation of money access to the greatest number of persons patronizing the public areas controlled by the Port Authority at these airports," JA 469-70. In fact, the Port stated that "[t]he only areas from which the First Amendment activities are excluded under the interim agreement are those congested areas where First Amendment activities would unquestionably interfere with airport operations." JA 470.

Even the present resolution containing the ban on distribution and solicitation allow, with restrictions, the "performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity"—activities potentially far more disruptive than those completely prohibited. *See* JA 523-24. This inconsistent treatment of different media of expression demonstrates again, at the very least, that the Port could have safely promulgated restrictions on distribution and solicitation short of a total ban.

IV. THE PORT AUTHORITY'S BAN ON FIRST AMENDMENT ACTIVITIES IS IN ANY EVENT UNREASONABLE.

"Public property which is not by tradition or designation a forum for communication" is a nonpublic forum. *Taxpayers for Vincent*, 466 U.S. at 814-15. In a nonpublic forum regulations of speech must be "reasonable and not an effort to suppress speech merely because the public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. And, although "[t]he Government's decision to restrict access to a nonforum . . . need not be the most

reasonable or the only reasonable limitation," *Cornelius*, 473 U.S. at 808, the ban may not be upheld out of hand. Rather, "[t]he reasonableness of the Government's restriction . . . must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

In determining whether the government's restriction on solicitation in *Kokinda* was reasonable, the plurality considered several factors: (1) the history of the restriction, 110 S. Ct. at 3122; (2) the government's interest as measured against the special attributes of the forum, *id.*; *see Heffron*, 452 U.S. at 650-51; and (3) the impact of the communicative activities on the forum, 110 S. Ct. at 3123; *see Cornelius*, 473 U.S. at 808-09.

A. History Of The Regulation.

Unlike the postal service in *Kokinda*, which had a long history of unsuccessful attempts to regulate solicitation on its walkways, 110 S. Ct. at 3172, the Port Authority can make no such claim. As explained above, an agreement between ISKCON and the Port Authority has been in effect for over seventeen years, allowing the distribution of religious literature and solicitation of funds within what even the Port Authority referred to as "appropriate public areas" of the JFK, LaGuardia and Newark air terminals. JA 63, 113.

In 1985, Morris Sloane, then Deputy Director of Aviation, testified with respect to petitioners' activities "that the operation has gone fairly well." Sloane Deposition at 75. Although in a subsequent affidavit Mr. Sloane referred to 183 unverified complaints which Port Authority staff had received between 1975 and 1986 regarding petitioners' activities, JA 514-15, those complaints—181 of which had been registered *before* his evalution—were apparently not of sufficient magnitude to alter his belief that the arrangement was working "fairly well." Moreover, in the more than three years between June, 1985,

when Mr. Sloane testified, and November, 1988, when the regulation was passed, the Port Authority claimed a total of two additional complaints, both of which involved the amorphous offense of "verbal abuse." Sloane Affidavit, Exhibit C.

Thus, unlike *Kokinda*, in which the postal service unsuccessfully attempted to regulate solicitation for fifteen years, the history here demonstrates that petitioners' expressive activities have not significantly impaired the Port Authority's ability to manage its terminals.

B. The Port Authority's Interest And The Characteristics Of The Terminals.

In the formal preamble to its regulation, the Port Authority articulates a single abstract interest—"the facilitation of air travel." JA 517. When measured against the special attributes of airport terminals, this interest is not of sufficient magnitude to justify a complete ban on expressive activities.

As described extensively above, airport terminals contain a multitude of facilities not directly related to air travel except by definitional break force. While restaurants, stores, bars, art galleries, postal facilities, and the like are convenient to travelers, they are not dedicated to air travel in the same way as are buying tickets, handling baggage, and getting on and off planes. Petitioners seek to conduct their activities only in those areas that correspond to commercial areas found in any city or town. JA 114-15.

There is no foundation, therefore, to conclude that petitioners' activities are inconsistent with the Port Authority's stated interest. The Port Authority seems to believe that an airport's "purpose" is whatever it says is one. Given the range of activities it permits at the airports, no other conclusion is possible. The notion of

inconsistency with airport "purpose" is therefore without objective content.

Moreover, as recent studies reveal, many travelers "spend their wait and flying time reading. Nearly 40% of business travelers will buy a newspaper or other reading material from a newsstand while in the airport; that compares with about 30% of the leisure travelers." Weinstein & Madrigal, *supra*, at 19. Colporteurs like petitioners are by no means an anomaly in transportation centers. To the contrary, in the tradition of the tract missionaries before them, petitioners provide a valuable service to travelers and others by distributing religious texts not otherwise easily available.

The legislative mandate given the Port Authority to manage its terminals, therefore, is not inconsistent with or impaired by the presence of distributors or solicitors—subject to reasonable regulation—in those terminal areas akin to public thoroughfares.

C. Impact of Expressive Activities On The Port Authority's Interests.

While a "finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated," *Cornelius*, 473 U.S. at 808, the Port Authority must demonstrate at least "some incompatibility with general expressive activity," *id.* at 809, in order to justify a complete ban on expressive activity. In *Kokinda*, for example, the Court agreed that soliciting was "inherently disruptive of the postal service's business." 110 S. Ct. at 3123. Although the Port Authority has not made a specific showing that the distribution of religious literature and the solicitation of voluntary contributions is "inherently" disruptive of air travel, it does suggest that a ban on expressive activity is nonetheless justified by the claimed existence at the airport of such problems as "pedestrian congestion," "captive audiences," "security concerns," "fraud," and "finance."

No such interest, first of all, is mentioned in the formal statement of reasons for the resolution, which, as noted, focused entirely on an abstract concern for inconsistency with "purpose." The five claims made in litigation thus take on the coloration of post hoc rationalizations rather than actual reasons. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (litigation affidavits are "traditionally . . . an inadequate basis for review" of a regulation). In any event, none is persuasive, either individually or in combination.

1. Congestion.

The Port Authority asserts that "[a]irport pedestrian congestion is [its] single greatest problem." JA 466. Yet, in the 17 years that this case has been pending, the Port has not reported a single instance of a traveler missing a flight, failing to make arrangements for ticketing, baggage, or ground transportation, or missing a meeting or appointment because of petitioners' activities. "Commonsense" dictates, and experience confirms, that "there are numerous locations in the Airport where [expressive activities] could be [conducted] without obstructing the flow of traffic." *Multimedia Publishing Co.*, 774 F. Supp. at 981.

2. Captive Audience.

While the bus passengers in *Lehman* were unable to avoid the unwanted advertising, 410 U.S. at 306-08 (Douglas, J., concurring), petitioners' activities do not engender a "captive audience" problem. Petitioners expressly eschew any intent to approach people in any of the airline-controlled areas, where they might have to wait in line or remain in a confined place. Rather, petitioners limit their activities to the general circulation areas of the terminals, where people can easily walk away or simply say "no." Appropriate place restrictions are therefore sufficient to rectify any perceived concerns.

3. *Security.*

Although the Port Authority need not show an active terrorist attack or a serious accident, "it is not free to foreclose expressive activity in public areas on mere speculation about danger." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990). During the Kuwait war, airport terminals nationwide were placed on heightened alert and made off-limits to all un-ticketed passengers until a perceived security threat had passed. *See* 14 C.F.R. §§ 107.1, *et seq.* (1991). An effective mechanism thus exists for dealing with any security threats found to exist. *See Rochford*, 585 F.2d at 270-71. No nexus, in any event, has been articulated between distributors and solicitors—who are subject to the same security checks as are the tens of millions of people who pass through the airport each year—on the one hand, and airport security on the other.

4. *Fraud.*

The Port Authority seeks to make much of petitioners' alleged "fraudulent" activities. By the Port's own calculation, however, there has not been a single claim of fraud or misrepresentation reported since 1981, and in the period betwen 1975 and 1986, Port Authority staff received a total of only eight complaints, none of which is substantiated. Sloane Affidavit, Exhibit C. Fraud, in any event, can be prevented or rectified by enforcement of existing laws. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

5. *Financing.*

The Port Authority contends that its restriction is reasonable because petitioners' activities are incompatible with the Port's sources of revenue. The Port Authority, of course, is a billion-dollar enterprise, whose primary sources of revenue are bonds and landing fees.

In 1990, the Port Authority had gross operating revenues of $1,690,730,000, a 10.7% increase over 1989. Port Auth. of N.Y. & N.J., *Comprehensive Annual Financial Report for the Year Ended December 31, 1990*, at 37 (n.d.). Although the Port Authority receives revenue for airport concessions, it is virtually inconceivable that petitioners' activities have had any discernible affect on the Port Authority's fiscal integrity.

In sum, the Port Authority's legitimate interests are not inconsistent with petitioners' activities. Although airports were created to facilitate air travel, a notably ill-defined notion, they serve many other functions "for the benefit of the people." Thus, not only is the distribution of literature and solicitation of donations not "inherently disruptive" of airport operations, but it is inherently consistent with the function, design and purpose of such facilities.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed insofar as it upheld the Port Authority's ban on the sale of literature and the solicitation of contributions. The judgment should be affirmed insofar as it held invalid the Port Authority's ban on the distribution of literature.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

February 18, 1992

TABLE A

FIRST AMENDMENT LITIGATION INVOLVING AIRPORTS (PARTIAL LIST)

1. *Final judgments.*

International Soc'y for Krishna Consciousness v. City of St. Louis, No. 70509-F (St. Louis, Mo., Cir. Ct. Apr. 2, 1979) No. 70509-F (St. Louis, Mo., Cir. Ct. Apr. 2, 1979) (Lambert International Airport, St. Louis); *International Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. La. 1978) (New Orleans International Airport); *International Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978) (General Mitchell Field, Milwaukee); *International Soc'y for Krishna Consciousness v. Adlum*, No. C-75-4015 (W.D. Wash. Feb. 7, 1978) (Seattle-Tacoma International Airport); *International Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Tex. 1977) (Houston Intercontinental Airport); *International Soc'y for Krishna Consciousness v. Englehardt*, 425 F. Supp. 176 (W.D. Mo. 1977) (Kansas City International Airport); *Mahoney v. Cook*, Civ. No. C-4778 (D. Colo. Aug. 25, 1975) (Stapleton International Airport).

2. *Temporary Injunctions.*

ACLU v. Ginty, No. C-2-77-251 (S.D. Ohio Apr. 19, 1977) (Port Columbus International Airport); *International Soc'y for Krishna Consciousness v. Cunningham*, Civ. No. 76-563 (D. Or. July 9, 1976) (Portland International Airport); *International Soc'y for Krishna Consciousness v. Lamb*, No. Civ-Lv-75-88-Rdf (D. Nev. Oct. 17, 1975) (McCarran International Airport, Las Vegas; *International Soc'y For Krishna Consciousness v. Wetzel*, No. Civ. 75-450 PHX WPC (D. Ariz. Sept. 2, 1975) (Skyharbor Municipal Airport, Phoenix); *International Soc'y for Krishna Consciousness*

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Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Petitioners – Cross-Respondents,

v.

WALTER LEE, Superintendent of Port Authority Police,

Respondent – Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT–CROSS-PETITIONER

ARTHUR P. BERG
Counsel of Record
PHILIP MAURER
ARNOLD D. KOLIKOFF

MILTON H. PACHTER
Attorney for Respondent – Cross-Petitioner
One World Trade Center – 66E
New York, New York 10048
(212) 435-6830

Counsel for Respondent – Cross-Petitioner

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QUESTIONS PRESENTED

The Port Authority of New York and New Jersey, the agency that operates the three major New York metropolitan area airports, restricts the repetitive solicitation of contributions and distribution of literature to the sidewalks adjacent to airport terminal buildings. The restriction is imposed as a means of promoting the safe, efficient and convenient use of those buildings by air travelers. The International Society for Krishna Consciousness, Inc., and one of its members, challenge the restrictions as violating the First Amendment to the United States Constitution.

The questions presented are:

1. Are the interior areas of airport terminal buildings, which have as their sole purpose the facilitation of safe, efficient and convenient air travel, public fora?

2. Is a restriction limiting the repetitive solicitation of money and distribution of literature to the sidewalks adjacent to airport terminal buildings, which have as their sole purpose the facilitation of safe, efficient and convenient air travel, valid under the First Amendment?

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

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WALTER LEE, Superintendent of Port Authority Police,

Respondent – Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT—CROSS-PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix to Petition for Writ of *Certiorari*, at 1-28) is reported at 925 F.2d 576 (2d Cir. 1991). The opinion of the District Court (Appendix to Petition for Writ of *Certiorari*, at 30-48) is reported at 721 F. Supp. 572 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1991. A Petition for Rehearing with Suggestion for Rehearing *En Banc* was timely filed, and was denied on April 25, 1991. The Petition for a Writ of *Certiorari* (No. 91-115) was filed on July 24, 1991. The Cross-Petition for a Writ of *Certiorari* (91-339) was filed on August 26, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

Airport Rules and Regulations of The Port Authority of New York and New Jersey:

Chapter III, Part B, as amended by resolution dated February 11, 1988, provides in pertinent part as follows:

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds."

STATEMENT OF THE CASE

In the interest of preserving the air terminal buildings at its airports for the air travel purpose to which they are dedicated, The Port Authority of New York and New Jersey restricts the repetitive solicitation of contributions and distribution of literature to the sidewalks adjacent to the air terminal buildings. Petitioners – Cross-Respondents challenge this restriction as violating the First Amendment to the United States Constitution.

A. The Parties

Petitioners – Cross-Respondents, plaintiffs below, are the International Society for Krishna Consciousness, Inc. ("ISKCON"), a not-for-profit religious organization, and a member of ISKCON.[1] Plaintiffs engage in the practice of *sankirtan*, which consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." (Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment, dated November 11, 1987 ("Plaintiffs' Statement") at ¶ 3 (JA 138))[2].

Respondent – Cross-Petitioner Walter Lee, defendant below, was Superintendent of the Port Authority Police when this suit began.[3] The Superintendent is an employee of The Port Authority of New York and New Jersey. The Port Authority was created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the

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[1] Hereinafter, the Petitioners – Cross-Respondents will be referred to as "Plaintiffs."

[2] "JA" followed by numerals refer to pages in the Joint Appendix. "PA" followed by numerals refer to pages in the Appendix to the Petition for a Writ of *Certiorari*.

[3] Walter Lee no longer holds this position. The caption has not been amended to substitute another named defendant. *See* Petition at 3 n.3.

Hereinafter, the Respondent – Cross-Petitioner will be referred to as "Superintendent."

statutorily defined Port District. 42 U.S. Stat. 174 (1921).[4] At the present time, pursuant to the 1921 Compact and subsequent bi-State legislation supplementary thereto, the Port Authority owns and/or operates thirty-seven (37) such facilities, including John F. Kennedy International Airport ("Kennedy"), La Guardia Airport ("La Guardia") and Newark International Airport ("Newark"). These three airports constitute the busiest and most heavily used metropolitan airport system in the world. In 1986, they served approximately 79 million travelers, constituting about eight percent of the United States' domestic flights, and over one-half of the United States' trans-Atlantic flights. It is estimated that the passenger load of the airports will increase to 110 million by the year 2000 (PA 4).

The Port Authority is charged with operating the three airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws §6634 (McKinney 1979); N.J. Stat. Ann. §32:1-35.4 (West 1963). In accordance with its statutory authority, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas, although the Port Authority retains certain supervisory powers (Civil Rule 3(g) Statement of Defendant Superintendent, dated January 19, 1988 ("Superintendent's Statement"), ¶¶ 32-38 (JA 452-53); Plaintiff's Statement, ¶¶ 146-49 (JA 176-77)). The Port Authority retains complete control over all unleased areas (Superintendent's Statement, ¶ 29 (JA 452)). It is only the unleased areas of the airports within Port Authority control that are the subject matter of this appeal (PA 4, 32).[5]

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[4] The Compact is codified at N.Y. Unconsol. Laws §§6401-6423 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963).

[5] Originally, this action concerned restrictions in all areas of the airport, both leased and unleased; and the airlines which lease space at airports were also defendants. However, over the course of the litigation, Plaintiffs agreed to withdraw their claims with respect to leased areas, and only the claims with respect to the unleased areas of the airports that are within Port Authority control remained for determination by the District Court (PA 4, 32).

(Footnote continued)

B. Description of The Port Authority Airports and Air Passenger Terminals

The following is a description of the airports and air terminal buildings as contained in the record.[6]

1. Kennedy Airport

The Port Authority has operated Kennedy Airport under a lease from the City of New York since June 1, 1947 (Plaintiffs' Statement, ¶ 13 (JA 141)). Situated in the southeast section of Queens County on Jamaica Bay, 15 miles by highway from mid-Manhattan, Kennedy annually serves over 27 million air passengers, and facilitates the transport of over one million tons of air cargo. (*Id.* ¶ 14, 15 (JA 141)). Kennedy contains many installations which support the movement of air passengers and cargo: passenger terminals, runways, taxiways, cargo service buildings, an airmail handling facility, fuel storage facilities, a hotel, administrative buildings, parking lots, car rental lots and others (*Id.* ¶¶ 16, 17, 18 (JA 141, 142)).

The Kennedy passenger terminals are located in the Central Terminal Area. The Kennedy passenger terminals consist of the International Arrivals Building ("IAB"), the East and West Wing buildings extending from the IAB and attached directly thereto, and eight free-standing "unit" terminals. The East and

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The settlement agreement between the Plaintiffs and the airlines provided, *inter alia*, that Plaintiffs would dismiss their lawsuit against the airlines with prejudice (JA 536-37).

Hereinafter, the phrase "air terminals" will refer only to Port Authority controlled areas, the subject of Plaintiffs' remaining claims.

[6] Because of intervening events, the description of the airports set forth below differs somewhat from the airports as they actually exist at the present time. For instance, the record refers to operations of Eastern Airlines, which has ceased operating. The Superintendent respectfully submits, however, that such differences are not material because the characteristics of the airports relied upon by the parties remain essentially the same.

West Wing buildings are leased to a number of foreign flag airlines. The first floor of the IAB contains a federal international inspection services hall for arriving international passengers and a lobby where arriving international passengers are met after clearing customs. The second floor contains patron service outlets such as a snack bar, restaurant, bank, gift shop, postal facility, and currency exchange facilities (Plaintiffs' Statement at ¶ 18 (JA 142); Affidavit of Leif Andersson, dated January 19, 1988 ("Andersson Affidavit"), ¶¶ 4-5 (JA 487)). The Wing buildings are leased to foreign flag carriers to provide flight reservations, ticket sales, passenger accommodations, aircraft boarding, ticket sales, baggage handling, communications, administration and a limited number of patron services (Plaintiffs' Statement, ¶¶ 19-23 (JA 142-44); Andersson Affidavit, ¶¶ 6-9 (JA 487-88)). The IAB is operated by the Port Authority (Plaintiffs' Statement, ¶¶ 18, 19, 24, 112, 114, 120 (JA 142-44, 165-68); Andersson Affidavit, ¶¶ 4-6 (JA 487)). Each of the eight unit terminals at Kennedy is leased by a single foreign or domestic airline. (Plaintiffs' Statement, ¶¶ 24-45 (JA 144)).

2. LaGuardia Airport

Like Kennedy, La Guardia has been operated by the Port Authority under a lease from the City of New York since 1947 (*Id.* ¶ 46 (JA 149)). Situated about eight miles from mid-Manhattan, in northwest Queens County, bordering on Flushing and Bowery Bays, La Guardia annually serves over 22 million passengers. (*Id.* ¶¶ 47, 48 (JA 149)). La Guardia's facilities include two runways, taxiways, a fuel storage facility, aircraft hangars, a police building, a mail facility, an air cargo facility, and garaging, maintenance and food preparation buildings (*Id.* ¶ 49 (JA 149)).

The La Guardia passenger terminal buildings are the Central Terminal Building ("CTB"), the Shuttle terminal, and the Delta/Northwest terminal. (*Id.* ¶¶ 50, 57 (JA 149, 151)). In the CTB, the baggage claim areas on the first floor, and the ticket counter, passenger and baggage check-in, passenger waiting and gate areas on the second floor are leased to airlines (*Id.* ¶¶ 50, 51, 54, 121 (JA 149, 150, 168)). The second floor of the CTB

also contains a central lobby area which is under Port Authority control (*Id.* ¶ 51 (JA 149)). The third floor contains space leased to airlines as airline clubs and airline offices (Superintendent's Statement, ¶ 12 (JA 448)). As at JFK, the unit terminals are leased to individual air carriers. (Plaintiff's Statement, ¶¶ 112, 114 (JA 165-66)).

3. Newark Airport

The Port Authority has operated Newark Airport under a lease from the City of Newark since March 22, 1948 (Plaintiffs' Statement, ¶ 61 (JA 152)). Situated about 16 miles from mid-Manhattan in Essex and Union counties, between the New Jersey Turnpike and U.S. Routes 1 and 9, Newark annually serves over 29 million passengers. (*Id.* ¶ 62, 64 (JA 152)). Newark includes passenger terminals, three runways, taxiways, a hotel, an aviation fuel storage area and fuel distribution system, a central heating and refrigeration plant, a postal facility and utility, and equipment, storage and hangar buildings (*Id.* ¶ 63 (JA 152)).

Newark's passenger terminals are located in two areas. The North Terminal is situated along Brewster Road; Terminals A, B and C are located in the Central Terminal Area (*Id.* ¶ 65 (JA 153)). The North Terminal, which is under Port Authority control, is a one-level building consisting of ticketing and baggage check-in areas, baggage retrieval areas, and patron facilities (*Id.* ¶ 66 (JA 153)). Terminals A and B each have a main terminal and three "satellite" buildings containing aircraft gate areas. Each main terminal has an upper departures level with facilities for airline ticketing and baggage check-in, and a lower arrivals level with airline baggage claim and ground transportation facilities (*Id.* ¶ 67 (JA 153)). These areas are leased by the respective airlines using them (*Id.* ¶ 122 (JA 168)). The concourse level, located halfway between the upper and lower levels of each terminal building, is leased in common by the airline tenants of each terminal. This level is used to provide passenger circulation space and passenger services, and contains eating facilities, retail stores and other patron services (*Id.* ¶¶ 68, 122 (JA 153-54, 168)).

C. The Purpose and Characteristics of the Port Authority Airports

The sole purpose of all three of the Port Authority airports is the facilitation of air transportation. (Superintendent's Statement, ¶¶ 39, 40 (JA 453)). All planning and operational decisions that are made with regard to the Port Authority air terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft (*Id.* ¶ 41 (JA 454)). Decisions regarding the number and location of boarding gates, placement of ticket counters, the provision of passenger information, and the number and types of consumer services at Port Authority airports all have as their goal assisting the air passenger in reaching his or her destination as quickly and conveniently as possible, and making any time spent in the terminal as pleasant as possible (*Id.* ¶ 42 (JA 454)).

The specialized purpose of the Port Authority air terminal buildings is reflected in all of their characteristics - design, usage, congestion problems, location, presence of captive audiences, financing and security concerns.

1. Design and Usage

The chief facilities of the terminals are ticket counters, passenger and baggage check-in facilities, passenger waiting areas, baggage claim areas, car rental and ground transportation desks, airline clubs and offices, and customs and immigration facilities (Plaintiffs' Statement, ¶¶ 7, 8, 18, 19, 25-31, 33-41, 43, 44-45, 52, 54-56, 58-60, 66, 70 (JA 139-40, 142-43, 144-45, 146-49, 150-52, 153, 154)).

The air terminal concourses are designed to facilitate the movement of departing passengers and their baggage to their ticketing/check-in facilities, and to their boarding gates and into their airplanes; the air terminal concourses are also designed to facilitate the movement of arriving air passengers out of their airplanes, into the terminals, to the baggage claim area and into

ground transportation vehicles. Concourses are designed to permit the quickest possible movement from the point of the passenger's arrival at the airport, by ground or air, to his or her point of departure (Superintendent's Statement, ¶ 47 (JA 455); Andersson Affidavit, ¶¶ 7-8 (JA 488)).

The air terminal concourses are not used as thoroughfares to or from destinations within the surrounding communities, nor as gathering places for community activities (Superintendent's Statement, ¶ 62 (JA 458)). Virtually all of the persons in the Port Authority airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes (*Id.* ¶ 63 (JA 458)). Air travel passengers comprise 80% of the persons in the airport terminals, "meeters and greeters" comprise 15%, and employees of airlines and other airport-related businesses comprise 5% (*Id.* ¶ 64 (JA 459)).

2. Congestion

Airport pedestrian congestion is the single greatest problem at Port Authority airports (*Id.* ¶ 49 (JA 456)). A pedestrian delay of minutes or even seconds can cause a traveler to incur substantial loss in travel time, and possibly additional costs, because of a missed plane (*Id.* ¶ 48 (JA 455)). Pedestrian routes in airports are heavily congested during peak travel hours, and the timing and duration of these peak periods are subject to considerable fluctuation because of weather conditions, mechanical difficulties in aircraft, airline hubbing activities and other factors (*Id.* ¶ 52 (JA 456)).

Many concourses in the existing terminals at the airports were designed before the development and use of wide body aircraft. These terminals are overloaded with pedestrians during peak hours. The introduction of, and increase in use of, large capacity aircraft have resulted in a continuing and growing pedestrian congestion problem (*Id.* ¶¶ 50, 51, 53-55 (JA 456-57)).

Airport congestion has caused the Port Authority to plan extensive capital alterations to its airports. The purpose of the

planned capital improvements to Port Authority airports is to reduce landside congestion and facilitate pedestrian movement within the passenger terminals at the Port Authority airports (*Id.* ¶¶ 56-57 (JA 457-58)). Planned capital improvements include construction of new terminals, reconfiguration of existing terminals, expansion of airport roadways, and development of ancillary facilities such as inter-terminal people movers and baggage handling systems (Plaintiffs' Statement, ¶¶ 84-89 (JA 158-60)).

3. **Location**

Each of the Port Authority's airports is isolated from the surrounding community. Access to each airport is provided by highways which serve as physical barriers to pedestrian access (Plaintiffs' Statement, ¶ 12 (JA 140); Superintendent's Statement, ¶ 61 (JA 458)).

4. **Captive Audiences**

The Port Authority air terminals contain "captive audiences" at virtually every location. Persons waiting in an airline terminal for an airplane to arrive or leave normally remain in a specific waiting area. Persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction (Superintendent's Statement, ¶¶ 58-60 (JA 458); Andersson Affidavit, ¶ 9 (JA 488)).

5. **Financing**

The Port Authority airports are financed by user fees, not by the general tax revenues of any state, county or city. These user fees are rentals paid by airline tenants, landing, terminal and ramp gate fees paid by individuals and corporations for use of the airports by itinerant and lessee aircraft, fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by

air passengers (such as parking lot fees) (Superintendent's Statement, ¶ 43 (JA 454)). Even the limited portion of airport capital funds received from the federal government are grant monies derived from airport user fees pursuant to the relevant statutes in Titles 26 and 49 of the United States Code (*Id.* ¶ 46 (JA 455)).

6. **Security**

Airports, including the Port Authority airports, have special security concerns. The history of skyjacking and other forms of terrorism at airports, including the 1975 bombing that caused death and injury at La Guardia, necessitates the maintenance of security precautions found in few places in our society, including the mandatory screening of air passengers, as required by Parts 107, 108, 109 and 129 of Title 14 of the Code of Federal Regulations (Superintendent's Statement, ¶ 65 (JA 459)). In addition, the Court is requested to take judicial notice of the heightened security precautions taken at airports during the recent operation "Desert Storm".

D. The Port Authority Regulations At Issue

The regulations relevant to this action are set forth in the Port Authority's Airport Rules and Regulations, at Part B of Chapter III, as amended, which became effective March 3, 1988 (Sloane Supplemental Affidavit, ¶¶ 8-9 (JA 513-14)).

Part B addresses non-commercial activity at Port Authority airport terminal space which is not occupied by a lessee, licensee or permittee (*Id.* ¶ 9(a) (JA 513)). Section 1 is applicable to the interior areas of buildings and regulates certain conduct addressed to passersby in a continuous or repetitive manner. Section 1(b)-(c) prohibits the continuous and repetitive distribution of literature to, and solicitation of money from, passersby. Section 1 does not prohibit private, one-on-one, or individualized religious or secular activity inside or outside of an airport terminal building.

Section 2 addresses conduct both within and without air terminal buildings. Section 2 does not prohibit solicitation and

distribution of literature on sidewalks outside terminal buildings provided that such activity does not interfere with airport operations as set forth in Section 2(b) (*Id.* ¶ 9(c) (JA 514)).

The purpose of Sections 1(b)-(c) and 2(b) is to restrict activity which is inconsistent with the purpose of the Port Authority air terminals – the facilitation of air travel – and which has the effects of contributing to the problems of air terminal pedestrian congestion and airport security, the annoyance of airport patrons who are a captive audience, diverting revenue from the airport, and defrauding airport patrons (*Id.* ¶ 10 (JA 514)). By restricting solicitation and distribution of literature to sidewalk areas, Port Authority officials are able to closely monitor such activity by Plaintiffs and others to identify conduct that violates the law or interferes with airport operations. The experience of the Port Authority and others clearly demonstrates the need for such monitoring (*Id.* ¶ 13 (JA 515); Affidavit of Philip Le B. Douglas, sworn to on October 12, 1984 ("Douglas Affidavit"), ¶¶ 17, 18, 22-25 (JA 78-80, 81-84)).

Analysis of the most recent survey of air passengers using the Port Authority airport terminal buildings demonstrates that at least 97% of the passengers in airport terminal buildings use the sidewalks outside such buildings for ingress or egress, and therefore, are exposed to solicitation and distribution of literature under the Port Authority regulations at issue. (Supplemental Affidavit of Frederick V. Hurst, Jr., sworn to on April 22, 1988 ("Hurst Supplemental Affidavit"), ¶ 15 (JA 530-31)).

E. Opinions Below

1. District Court Opinion

The District Court granted Plaintiffs' motion for summary judgment and enjoined the Superintendent from enforcing regulations prohibiting the continuous and repetitive solicitation of contributions and distribution of literature inside the air terminals on the ground that the regulations violated the First Amendment.

The District Court held that the standard to be applied in judging the validity of the Port Authority's regulations is this Court's now familiar public forum analysis contained in *Perry*

Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) and subsequent cases.

The District Court noted that "[i]t is now well settled that streets, parks and sidewalks are traditional public fora[,]" (PA 38) and, that designated public fora are places "which the 'State has [intentionally] opened for use by the public as a place for expressive activity.'" (PA 38) The District Court held that the air terminals were traditional public fora because they possessed the characteristics of a "bustling metropolitan boulevard" (PA 40).

The court rejected the Superintendent's contention that public streets and parks are unique species of public property (PA 41). The court also rejected the Superintendent's argument that the sole purpose of airport terminals as facilitators of air transportation and the attendant characteristics of airport terminals – including their design, usage, conditions of congestion, presence of captive audiences, isolation from surrounding communities, financing and security concerns – distinguish airport terminals from city streets. According to the District Court, such purpose and characteristics do not take airports out of the traditional public forum classification, and, to the extent that First Amendment activity would interfere with airport operations, such issues should be addressed in time, place and manner restrictions (PA 43-47).

2. The Court of Appeals Opinion

The Court of Appeals reversed in part and affirmed in part, the judgment below, holding that the Port Authority rules at issue were valid insofar as they prohibited solicitation, but were invalid insofar as they prohibited the distribution of literature, within the air terminals.

After reviewing the facts of this case and public forum analysis in general (PA 1-9), the Court of Appeals declared that "the sole issue on appeal . . . is whether the terminal areas are traditional public fora for protected speech." (PA 10). The Second Circuit then stated that prior to this Court's decision in *United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115 (1990), it would

have classified the air terminals as public fora because the established authority in other circuits had classified airports as pubic fora, and the court was reluctant to create a conflict when the view of other circuit courts was not unreasonable. However, the court below continued: "*Kokinda*[ ] has altered public forum analysis and . . . we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (PA 10-11).

Under the Second Circuit's analysis, *Kokinda* upheld the prohibition of solicitation on the post office walkway based upon two separate rationales. First, in the plurality opinion written by Justice O'Connor, the prohibition was valid because the walkway was a nonpublic forum since it "was not a public passageway designed 'to facilitate the daily commerce and life of the neighborhood or city' but was intended 'solely to assist postal patrons' to get access to postal services. [110 S. Ct.] at 3120." (PA 11). And, second, in the concurring opinion of Justice Kennedy, the prohibition was valid because solicitation was sufficiently disruptive conduct so that it could be banned irrespective of whether the walkway was a public forum (PA 12).

The Court of Appeals held that the passageways in the Port Authority's air terminals are similar to the walkway in *Kokinda*. Both the airport terminals' passageways and the post office walkway are intended solely to facilitate a particular class of transactions – air travel in the case of the airport terminal passageways, and postal activities in the case of the post office walkways. As with post office walkways, people do not use the passageways in air terminals to meet friends for lunch, window-shop, take the air, or engage in any of the other purposes for which city streets are used. The passageways are used solely for air-related purposes by travelers, persons connected with air travelers, or employees of businesses serving air travelers (PA 12, 13). The similar physical appearance of the airport passageways and city streets was held to be of no moment in view of the special purpose of the airport (PA 13).

Furthermore, the majority stated, the Port Authority's anti-solicitation restriction served precisely the same purpose as the restriction upheld in *Kokinda*. Like the Postal Service in *Kokinda*,

the Port Authority has an interest in protecting its airport patrons from the disruption of in-person solicitation (PA 13-14). In fact, the Court of Appeals held that solicitation would have a greater disruptive effect in the Port Authority's air terminals than in a post office walkway because of the nature of the air terminals:

> "The Port Authority's concern over disruption of the air-traveling public is justified on the present record. That record establishes that pedestrian congestion is one of the greatest problems facing the three terminals. Much of the facilities in question was built before wide-body aircraft, and a pressing need for expansion exists. Air travelers, who are often weighted down by cumbersome baggage and may be hurrying to catch a plane or to arrange ground transportation, will find in-person solicitation even more disruptive than did the postal patrons in *Kokinda*." (PA 14).

Although the Court of Appeals upheld the validity of the ban on solicitation, the Court of Appeals reached a different conclusion with respect to the ban on the distribution of literature inside the air terminals. Relying upon Justice Kennedy's characterization of solicitation as a far more disruptive activity than leafleting, the Second Circuit held, without further reasoning, that the Port Authority's ban on leafleting in the air terminals violated the First Amendment (PA 14-15).

Chief Judge Oakes dissented, stating that in his view the air terminals were public fora. According to the dissent, *Kokinda* did not announce a new rule under which a site's public forum status was dependent upon its purpose (PA 17-20). In Chief Judge Oakes' view, a number of factors, especially airport passageways' similarity to public streets, caused the airport terminals to have the status of public fora (PA 21).

Finally, Chief Judge Oakes noted that, in his view, there is no distinction between the distribution of literature and solicitation since "[b]oth involve the same congestion [and] irritation" (PA 28).

SUMMARY OF ARGUMENT

The Port Authority air terminals are not traditional public fora because their purpose is the facilitation of air travel, not public assembly or debate. The Court of Appeals and the District Court both recognize that the air terminals have this purpose and even plaintiffs admit that the air terminals were created to facilitate air travel.

The Port Authority air terminals' purpose of facilitating air travel is reflected in all of their characteristics, including design, usage, unique congestion problems, lack of integration with neighboring communities, presence of captive audiences, financing and security concerns. All airport terminal functions and services are related to air travel and virtually all persons at Port Authority air terminals are there for air travel purposes.

The Port Authority air terminals clearly differ from traditional public fora. The essential nature of a street or park is that it be open to the public for general use. In contrast, the Port Authority air terminals would retain their essential nature even if access were restricted to only passengers and air travel employees. In addition, the Port Authority air terminals are physically separated from the surrounding communities. Thus, unlike streets, the air terminals do not serve as necessary conduits in the daily affairs of a locality's citizens.

The Port Authority air terminals' purpose of facilitating air travel requires the movement of passengers to departing aircraft and from arriving aircraft in limited periods of time, thereby creating extreme congestion problems and captive audiences, which highlight the specialized purpose of these sites. In addition, the specialized purpose of air terminals is reflected in their unique security concerns. The security precautions continuously taken in airports are taken in few other places in our society, and certainly not on streets or in parks.

It is also clear that Plaintiffs' reliance on lower court decisions holding that air terminals are public fora is misplaced. These decisions erroneously rely on factors which this Court has repeatedly held are not determinative of public forum status:

physical resemblance to streets, unrestricted access and usefulness for expressive activity. If these factors determined the public forum status of government property, then virtually every government building, including courthouses, would be a public forum for expressive activity.

Since the Port Authority air terminals have as their specific purpose the facilitation of air travel and not public assembly or debate, the restrictions challenged by Plaintiffs should be judged by the standards applicable to nonpublic fora. Under public forum analysis, a restriction on expressive activity in a nonpublic forum is valid if the regulation is viewpoint neutral and is reasonable. The Port Authority restrictions easily meet this test.

First, the Port Authority regulations are clearly viewpoint neutral since the advocacy of any one position is not favored over the advocacy of any other position. Second, the Port Authority regulations are also clearly reasonable since they further the Port Authority's legitimate managerial interest in controlling problems of congestion, security, fraud and protecting captive audiences, and, moreover, they restrict only the most disruptive expressive activity.

Even if the Port Authority air terminals were public fora, the regulations at issue would still be valid because they are content-neutral, reasonable, narrowly tailored to achieve significant government interests and leave open ample alternate means of communication. The regulations are content neutral since they restrict all repetitive solicitation and distribution of literature regardless of content. The regulations are reasonable in light of the Port Authority's managerial interests identified above. The regulations are narrowly tailored since they address only the two types of expression, solicitation and distribution of literature, which have the greatest adverse impact on air passengers. Finally, the regulations leave open ample alternative means of communication since they permit solicitation and the distribution of literature on the sidewalks which are used for ingress and egress by virtually everyone who uses the air terminals.

ARGUMENT

POINT I

UNDER PUBLIC FORUM ANALYSIS, THE PORT AUTHORITY AIR TERMINALS ARE NOT TRADITIONAL PUBLIC FORA BECAUSE THEIR PURPOSE IS THE FACILITATION OF AIR TRAVEL, NOT PUBLIC ASSEMBLY AND DEBATE.

A. Public Forum Analysis Is Applicable To The Instant Case.

At issue in the instant case are the conflicting managerial interest of the Port Authority to preserve its air terminals for the air travel use to which they are lawfully dedicated and the interest of the plaintiffs to solicit and distribute literature in such terminals. Public forum analysis is the method this Court has developed to resolve such disputes.

Since the 1974 decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court has relied upon public forum analysis to decide cases in which persons have sought to use government property for expressive activity in violation of rules which restrict or prohibit such activity. *See United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115, 3119 (1990).

In 1983, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court for the first time set forth a comprehensive analytical model for determining the extent to which a government agency must permit expressive activity in a publicly-owned facility. The model differentiates among a traditional public forum, a designated public forum, and a nonpublic forum. *Id.* at 45-46. Under the *Perry* model, a government may not constitutionally prohibit expressive activity in a traditional public forum or a designated public forum[7] unless

[7] Plaintiffs do not argue that the Port Authority airports are designated public fora (PA 39). Moreover, any such claim would have to be rejected out of hand

(Footnote continued)

the prohibition is content-neutral or necessary to serve a compelling government interest. Even if content-neutral, the regulation is valid only if it is reasonable, narrowly tailored to achieve a significant governmental interest and leaves open ample alternative means of communication. In contrast, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves the forum for its "intended purposes" is fully constitutional as long as it does not discriminate against expressions of a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 806 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49.

The public forum analysis consistently used by this Court correctly balances both the interests of those seeking to use a place for expressive activities and the essential governmental interest in preserving government property for its intended purpose. As held by this Court,

> "'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Greer v. Spock*, 424 U.S. 824, 836 (1976), *quoting Adderley v. Florida*, 385 U.S. 39, 47 (1966).

Finally, the use of public forum analysis is far superior to an *ad hoc* balancing of interests because public forum analysis provides the stability "essential for a reasonably well-ordered and coherently administrable legal system." Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. Cin. L. Rev. 739, 754-55 (1991).

since a designated public forum only exists when a government intentionally opens a place or means of communication for public discourse. Government inaction or government permission of limited discourse does not suffice. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). The record clearly demonstrates that the Port Authority airport terminals have not been "intentionally designated" as a public forum (JA 154-56, 473-74, 512-13).

> "Whether from the perspective of the government official concerned with determining the permissibility of contemplated regulations, or from the perspective of the citizen concerned with planning his or her affairs, the fluid and ambiguous nature of unstructured judicial interest balancing undercuts the interests in prediction and reliance." *Id.*, at 755 (note omitted).

B. The Port Authority Air Terminals Are Not Traditional Public Fora Because Their Sole Purpose Is The Facilitation Of Air Travel.

This Court has held that a site owned by the government is a traditional public forum only if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802, *quoting, Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45. This description hearkens back to the often-quoted passage from *Hague v. C.I.O.*, 307 U.S. 496 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515.

As the quotation from *Hague* suggests, public streets and parks are traditional public fora because service as a central gathering place for the communication of ideas is inherent in their nature.[8]

[8] A college campus has been described as possessing "many of the characteristics of a traditional public forum" for its students, *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 803, *citing Widmar v. Vincent*, 454 U.S. 263 (1981), because a college campus serves as a "marketplace of ideas." *Widmar v. Vincent*, 454 U.S. at 267 n.5 (citations omitted).

See United States v. Kokinda, 110 S. Ct. at 3128 (Brennan, J., dissenting); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

Although this Court has never ruled upon the public forum status of an airport terminal,[9] the application of public forum analysis to the instant case makes it evident that the Port Authority air terminals are not public fora. The sole purpose of the air terminals is the facilitation of air travel, not "assembly and debate," either by "long tradition" or "government fiat." *See Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 802; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45.[10] Significantly, both the District Court and the Court of Appeals below agreed that the purpose of the Port Authority airports is the facilitation of air travel (PA 5, 13, 14, 43, 47).[11] In fact, even Plaintiffs concede that "airports were created to facilitate air travel." *See* Plaintiff's Brief, at 47.

[9] The public forum status of an airport was presented to the Court in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), but the Court did not reach the issue. The Los Angeles International Airport regulation at issue was held to be invalid because the regulation was so broad that it could be interpreted as prohibiting even the reading of a newspaper. *Id.* at 573-74. One of the issues upon which *certiorari* was granted was the public forum status of the airport. *Id.* at 577 (White J., concurring, joined by the Chief Justice); *Summary of Orders*, 55 U.S.L.W. 3197 (1986)(questions raised on petition). The concurring opinion specifically suggested that

> "the Court's opinion . . . should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum." *Id.* at 577 (Justice White, concurring, joined by Chief Justice Rehnquist).

[10] Plaintiffs' reference to the Federal Aviation Authority's ("FAA's") statements as an airport proprietor regarding the public forum status of National and Dulles Airports are irrelevant since those statements are inconsistent with the record in this case. Moreover, the brief *amicus curiae* submitted by the Airports Association Council International - North America demonstrates that the FAA's view is overwhelmingly a minority one among airport operators.

[11] Although the District Court did not find that the purpose of the airports rendered the air terminals to be nonpublic fora, the District Court did not reject the contention that air travel is the purpose of the airports (PA 47).

The Port Authority airports' sole purpose of facilitating air travel is reflected in all of their characteristics - planning, operation, design, usage, financing, lack of integration with neighboring communities, presence of captive audiences, and unique congestion and security problems. These characteristics both attest to the special purpose of the Port Authority air terminals and distinguish them from traditional public fora. In previous cases, this Court has examined the nature of alleged public fora to determine their public forum status. *See, e.g., United States v. Kokinda, supra; Greer v. Spock, supra; Lehman v. City of Shaker Heights, supra.*

1. **Design and Usage**

It is undisputed in the record in this case that "all planning and operational decisions that are made with regard to the Port Authority airport terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft"[12] (Superintendent's Statement, ¶ 41 (JA 454)).

Significantly, virtually all of the persons in the airport terminals are there for an air travel purpose, as travelers, meeters and greeters, or airport-related employees. (Superintendent's Statement, ¶ 63-64 (JA 458-59)). As the Court of Appeals stated,

> "Persons using the passageways in terminals are not there primarily to meet a friend for lunch, window-

[12] This sole purpose of facilitating air travel is not unique to the Port Authority airports. Such purpose is acknowledged in the general literature on airports, including works relied upon by Plaintiffs. *See* International Air Transport Ass'n, *Airport Terminals Reference Manual*, §§3.1.1., 3.4.1.1., 3.4.3 (7th ed. 1989) (hereinafter "IATA Manual"); N. Ashford & P.H. Wright, *Airport Engineering*, 221-22 (2d ed. 1984); N. Ashford, H.P.M. Stanton & C. Moore, *Airport Operations*, 5-7, 203-09 (1984); R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, 325-27 (3d ed. 1983); A.T. Wells, *Airport Planning and Management*, 157 (1986) (hereinafter "Wells"); P.H. Wright & N.J. Ashford, *Transportation Engineering*, 620-21 (3d ed. 1989).

> shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. *They are solely there as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.*" (PA 13) (emphasis added).[13]

Hence, the Port Authority air terminals are completely

> "[u]nlike the public street described in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L. Ed. 2d 298 (1981), which was 'continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,' *id.* at 651, 101 S. Ct., at 2566, . . ." *United States v. Kokinda*, 110 S. Ct. at 3120 (square brackets in original).

Consequently, whereas streets and parks "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions", *Hague v. C.I.O.*, 307 U.S. at 515, it is undisputed that persons use Port Authority airports only for travel-related purposes.[14]

[13] As stated in one work cited by Plaintiffs:

> "When focusing on the needs of the airline passenger in the airport environment, it is necessary to consider the fact that none of the ultimate users of the airport really wish to be there; they are in the airport only for the purpose of getting somewhere else. It has been demonstrated that passengers are normally under fairly high emotional stress in the airport environment and, as such, have needs that are unique to that situation." Doughty, *Review of Passenger Service Issues at Airports*, 7, in *Airports For People: Proceedings of the 8th World Conference Organized by the Institution of Civil Engineers* (1988) (hereinafter "Doughty").

[14] The Port Authority air terminals are not atypical in this regard. Indeed, the most recent source relied upon by Plaintiffs regarding airport concessions

(Footnote continued)

Finally, the Port Authority air terminals and the traditional public fora of parks, streets, and sidewalks differ in their *essential nature*:

> "Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations." *See United States v. Kokinda*, 110 S. Ct. at 3128 (Brennan, J., dissenting).

In contrast, open access to all members of the public is not inherent in the nature of, nor integral to the function of, air terminals, which do not serve as central gathering places. Clearly, unlike streets, the Port Authority air terminals would retain their essential nature and function even if access were granted only to ticketed airline passengers and air travel employees, and the air terminals were used only for the boarding and deboarding of aircraft.

2. Congestion

At an airport terminal, unlike at a street or a park, a pedestrian delay of minutes or even seconds could very well cause a loss of hours in total travel time because of a missed plane (Superintendent's Statement, ¶ 48 (JA 455)). *See* IATA Manual, *supra* note 12, §§3.1.1, 3.3.2.2, 3.3.2.3, 3.4.1.1, 3.4.3; W. Hart, *The Airport Passenger Terminal*, 17-18 (1985); A.T. Wells, *Airport Planning and Management*, *supra*, at 140, 142, 157; P.H. Wright & N.J. Ashford, *Transportation Engineering*, 620 (3d ed. 1989).

The Port Authority airport terminal pedestrian routes are especially congested during peak travel hours, whose timing and

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describe the air terminal population as consisting *only* of the same travel related groups identified as visitors to the Port Authority air terminals: Travelers, "meeters and greeters" and airline/airport employees. Weinstein and Madrigal, *Airport Customers and Their Needs for the 1990's*, Airport Services, May/June 1991, 18-20 (hereinafter "Weinstein").

duration are subject to considerable fluctuation as to time and length (Superintendent's Statement at ¶ 52 (JA 456)). And, the congestion problems in many concourses in the Port Authority air terminals have been made worse by the introduction of, and increase in use of, large capacity aircraft (Superintendent's Statement, ¶¶ 50, 51, 53-55 (JA 456-57)). As the Court of Appeals stated, airport concourses are "among society's choke-points" and the "record establishes that pedestrian congestion is one of the greatest problems facing the three terminals." (PA 14)

The Port Authority's congestion problems are shared by other major United States airports. Congestion at peak periods subject to unpredictable fluctuation is common at other airports. *See generally*, Office of Technology Assessment, Congress, *Airport System Development*, 48-49 (1984). A senior research advisor of the Transportation Research Board has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May/June 1986, 2, 5. Moreover, congestion at major airports is getting worse. In the words of the Congressional Budget Office,

> "Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates worsening of airport congestion in coming years." Congressional Budget Office, *Financing U.S. Airports in the 1980's*, xix (1984).

And the Federal Aviation Administration has estimated that between the years 1984 and 2000 the annual number of passengers using the nation's airports will increase by more than 70%, and will result in the nation's airports being "swamped". *Id.*, at 3.

3. Location

The location of the Port Authority air terminals clearly distinguishes them from traditional public fora. All three airports are separated from the city streets of nearby communities by ribbons of highways (Plaintiffs' Statement, ¶ 12 (JA 140);

Superintendent's Statement, ¶ 61 (JA 458)).[15] Because of the segregation of air terminals from surrounding communities, air terminals, unlike public streets, do not serve as "a necessary conduit in the daily affairs of a locality's citizens". *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).[16]

This physical segregation from surrounding communities makes the Port Authority air terminals dissimilar to the streets surrounding this Court held to be a public forum in *United States v. Grace*, 461 U.S. 171 (1983),[17] and similar to the streets of the military base held to be a nonpublic forum in *Greer v. Spock*, *supra*. In *Grace*, this Court held that the sidewalks on the perimeter of the Supreme Court Building grounds were a public forum because they were indistinguishable from other Washington, D.C. sidewalks. More specifically, the Court stated that,

> "There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 180.

Greer, however, upheld the exclusion of leafleting from the Fort Dix Military Reservation in New Jersey because the streets of Fort Dix were not integrated into the streets of any surrounding community. *Greer v. Spock*, 424 U.S. at 835-36. The Port Authority air terminals are like the streets involved in *Greer* since, because of their location, they are not used in the daily life of surrounding communities.

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[15] This physical segregation is emphasized by the phenonenom of "fly-in" campaigning described by Plaintiffs. Candidates "fly-in" and then "fly-out" because it requires too much effort to travel between an airport and the community the airport serves. *See* Shapiro, *Hello, I Must Be Going*, Time, March 7, 1988, 20.

[16] Hereinafter, "ISKCON" will refer to "International Society for Krishna Consciousness, Inc." or similarly named parties.

[17] *See Pearson v. United States*, 581 A.2d 347, 353 (D.C. App. 1990), *cert. denied*, __ U.S. __, 112 S. Ct. 51 (1991) (Supreme Court grounds other than surrounding sidewalk are not a public forum).

4. Captive Audiences

The presence of captive audiences in air terminals distinguish such terminals from the traditional public fora of streets and parks. Captive audiences exist throughout the air terminals – at enplaning and deplaning points, at ticket counters, security checkpoints, baggage conveyor belts, and car rental and other ground transportation counters. At all of these locations, travelers tend to remain in place in order to complete travel-related tasks (Superintendent's Statement, ¶¶ 58-60 (JA 458); Andersson Affidavit, ¶ 9 (JA 488)). *See* Doughty, *supra* note 13, at 7. As noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited persuasion. *Lehman v. City of Shaker Heights*, 418 U.S., at 307 (1974) (Douglas, J., concurring); *cf., Consolidated Edison Company of New York, Inc. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980).

5. Financing

The Port Authority airports' financing differentiates them from traditional public fora. Streets and parks generally are financed from general tax funds, reflecting their service to the public at large. In contrast, the Port Authority airports are financed by user fees paid by the airlines, concessionaires, air passengers[18] and general aviation (Superintendent's Statement, ¶ 43 (JA 454)).[19]

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[18] Prior to the enactment of the Aviation Safety and Capacity Expansion Act of 1990, an airport operator could lawfully impose fees on airline passengers only for the use of ancillary services such as parking lots, but not for the use of the airport generally. *See* 49 U.S.C. app. §1513(a) (1988). The legislation enacted in 1990 authorizes, under certain restrictions, airport operators to impose user fees directly on air passengers, to finance airport capital improvements. Aviation Safety and Capacity Expansion Act of 1990, §9110, 49 U.S.C.A. app. §1513(a),(e) (Supp. 1991).

[19] The Port Authority airports are typical of the national model. In a 1987 report to Congress, the Secretary of Transportation observed that virtually all airport funding comes from airport-user sources. U.S. Department of Transportation, *National Plan of Integrated Airport Systems 1986-1995*, 17 (1987).

Even the small amount of federal grant money received by the Port Authority for airport capital improvements is derived from user fees collected from air passengers via an airline ticket excise tax, and from transporters of property by air via an air-bill excise tax (*Id.*, ¶ 46 (JA 455)). Internal Revenue Code of 1954, §§4261-62, 4271-72 *as amended*, 26 U.S.C. §§4261-62, 4271-72 (1988 & Supp. I 1989). Significantly, an explicit statutory requirement for the receipt of federal aid is that an airport be self-supporting to the greatest extent possible. Airport and Airway Improvement Act of 1982, *as amended*, §511(a)(9), 49 U.S.C. app. §2210(a)(9) (1988).

The self-sustaining nature of the Port Authority airports is a characteristic they share in common with the postal facilities examined in *United States v. Kokinda*, *supra*. The plurality opinion observed that the Postal Service was intended by Congress to be run more like a business than its predecessor, the Post Office Department, in that Congress directed the Postal Service to become a self-sustaining entity. 110 S. Ct. at 3122.

6. Security

The well-known history of skyjacking and other forms of terrorism at airports, including the 1975 bombing at LaGuardia Airport, has resulted in the adoption of equally as well-known security precautions in air terminals (Superintendent's Statement, ¶ 65 (JA 459)). Thus, air terminal design now includes security requirements as a basic consideration. *See* IATA Manual, *supra* note 12, §3.3.6. Indeed, security precautions of a nature which need to be taken at few other locations in our society *must* be taken at air terminals under the mandate of federal law. The Air Transportation Security Act of 1974 required the Secretary of Transportation to issue regulations for the mandatory screening of air passengers using international, interstate and intrastate flights. Air Transportation Security Act of 1974, §202, *as amended*, 49 U.S.C. app. §§1356, 1357 (1988). The air security regulations currently in effect impose security obligations on airport operators (14 C.F.R., Part 107 (1991)), airline operators (*id.* Part 108, Part 129), and indirect air carriers such as freight forwarders (*id.* Part 109).

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In sum, Port Authority air terminals are not public fora because their sole purpose is the facilitation of safe, efficient and convenient air travel, *not* public assembly and debate. The special purpose of airports is reflected in all of their characteristics such as planning, operation, design, usage, unique congestion problems, location, presence of captive audiences, financing and security problems.

C. Plaintiffs And The Lower Court Precedent Upon Which They Rely Ignore Public Forum Analysis Principles Which Make It Clear That A Site Is Not A Public Forum Because Of A Physical Resemblance To A City Street, Unrestricted Access Or Usefulness For Expressive Activity.

Plaintiffs' Brief virtually ignores the public forum analysis principles enunciated by this Court. Instead, Plaintiffs rely on lower court precedents that have classified airports as traditional public fora merely because of the alleged physical resemblance of air terminal concourses to city streets, because access to the terminals is unrestricted and/or because the terminals would be useful to Plaintiffs as a site for solicitation and distribution of literature. Under the decisions of this Court, it is clear that none of these factors either separately or together render a site a public forum.

This Court has made it clear that a place is not a public forum merely because it resembles a city street. *See United States v. Kokinda*, 110 S. Ct. at 3121; *Frisby v. Schultz*, 487 U.S. at 479. Thus, in *Greer v. Spock*, *supra*, this Court rejected the claim that a street or sidewalk on a military base open to the public was a public forum because of its physical resemblance to a city street or sidewalk. Rather, the Court held that such streets were not public fora because they are different in purpose from a city street. 424 U.S. at 835-37. Similarly, in *Kokinda*, a plurality of this Court classified a walkway to a post office as a nonpublic forum despite its physical similarity to a city sidewalk because of its specialized purpose:

> "The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the

> parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." 110 S.Ct. at 3120.

Thus, even if air terminals have some physical resemblance to city streets, this does not make them public fora.

In addition, it is beyond dispute that unrestricted access to a site does not render a site a public forum. *United States v. Kokinda*, 110 S.Ct. at 3119; *Greer v. Spock*, 424 U.S. at 836, *quoting Adderley v. Florida*, 385 U.S. at 47. If it did, then every government facility open to the public, from courthouses to libraries to office buildings, would be a public forum.

This Court has explicitly stated that a public forum does not exist merely because persons are freely permitted to enter a government owned site. Indeed, the Court has

> " . . . expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.'" *United States v. Albertini*, 472 U.S. 675, 686 (1985) *quoting Greer v. Spock*, 424 U.S. at 836; *see also, United States v. Grace*, 461 U.S. at 177.

In *Greer v. Spock*, *supra*, this Court held that the Fort Dix Military reservation was not a public forum despite the fact that members of the public were freely permitted to enter the facility and did so. *See* 424 U.S. at 830, 837. The open character of Fort Dix was made clear in the description of the facility set forth in Justice Brennan's dissent:

> "No entrance to [Fort Dix] is manned by a sentry or blocked by any barrier. The reservation is crossed by ten paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times

> of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. A 1970 traffic survey indicated that 66,000 civilian and military vehicles per day entered and exited the Fort. Indeed, the reservation is so open as to create a danger of muggings after payday and a problem with prostitution." *Id.* at 851.

Most recently, in *United States v. Kokinda*, *supra*, a plurality of this Court rejected the argument that a post office walkway was a public forum because it was open to the public:

> "Postal entryways, like the walkways at issue in *Greer*, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." 110 S. Ct. at 3121.

Therefore, it is clear that the lack of restriction to entry to the Port Authority air terminals does not make them public fora.

Finally, it is equally clear that the usefulness of government property as a site for expressive activity does not make such property a traditional public forum under applicable Supreme Court precedent. In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), which held that lampposts are not public fora for the posting of signs, this Court rejected in unequivocal terms the proposition that a publicly-owned facility is a public forum because it would be a useful place for the communication of ideas:

> "Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. *Cf., United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. at 131." *Id.* at 814 (footnote omitted); *see also United States v. Albertini*, 472 U.S. at 686; *Greer v. Spock*, 424 U.S. at 838 n.10.

Similarly, in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), this Court held that household letterboxes were not public fora despite the fact that they are useful as vehicles for the communication of ideas. 453 U.S at 130 n. 6. Indeed, the Court viewed the desirability of the letterboxes as a device for appellees' communication of their ideas as the "causal factor which led to [the *Greenburgh*] litigation." *Id.* at 123. Nevertheless, the Court upheld the Postal Services' ban on the placement of circulars in letterboxes on the grounds that it was reasonable in light of the letterboxes' purpose of serving as receptacles for items transmitted through the United States mail. *See id.* at 132. As this Court noted,

> "[The dissent's] analysis assumes that simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum. Our cases provide no support for such a sweeping proposition. Certainly, a bulletin board in a cafeteria at Fort Dix is 'specifically used for the communication of information and ideas,' but such a bulletin board is no more a 'public forum' than are the street corners and parking lots found not to be so at the same military base. *Greer v. Spock*, 424 US 828 (1976). Likewise, the advertising space made available in public transportation in the city of Shaker Heights is 'specifically used for the communication of information and ideas,' but that fact alone was not sufficient to transform that space into a 'public forum' for First Amendment purposes. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)." *Id.* at 130 n.6.

Consequently, it is clear that their usefulness as sites for expressive activity does not make the Port Authority air terminals public fora.

The lower court decisions relied upon by Plaintiffs holding airports to be public fora ignore the reasoning of the decisions of this Court in *Lehman*, *Greer*, *Kokinda*, *Taxpayers for Vincent* and *Greenburgh Civic Ass'ns*. The circuit court decisions which hold airports to be public fora are *not* based upon a

finding that the purpose of airports is to communicate ideas or that airports traditionally serve that function for adjacent communities. Rather, those decisions rely on factors which this Court has held are *not* determinative of public forum status.

For example in *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), the Ninth Circuit held that Oakland's airport was a public forum, it was public property, *id.* at 1131, using "public" to refer to government ownership or unrestricted access. Similarly, in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), the respective circuits held that the airports in question were public fora because airport concourses physically resemble city streets, because the public had unrestricted access to the airports and because large numbers of people used the airports.[20] *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d at 764; *Fernandes v. Limmer*, 663 F.2d at 627; *Chicago Area Military Project v. City of Chicago*, 508 F.2d at 925.[21]

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[20] *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968), which addresses leafleting and related activity in the Port Authority Bus Terminal in midtown Manhattan, suffers from the same defect in reasoning. *Wolin*, which was decided before development of public forum analysis, held that the bus terminal, whose hallways resemble city streets, was an appropriate place for such activity because of its open access and the number of persons who use it each day. *Id.* at 89. As set forth above, this reasoning is inconsistent with this Court's public forum decisions. Significantly, *Wolin* did not find that the bus terminal had public communication as a purpose, as is required by forum analysis, but rather merely found that leafleting and solicitation would not be physically incompatible with the terminal's transportation uses. *Id.* at 90.

[21] A number of other circuit court decisions holding airports to be public fora merely rely on prior circuit court decisions so holding. *See Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978). Another circuit court decision treats an airport as a public forum without describing it as such or explaining why that classification was appropriate. *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

Consequently, these circuit court decisions are not persuasive since their rationale is contrary to the public forum principles enunciated by this Court.

D. Plaintiffs' Discussion Of Places Other Than Airports Does Not Establish That The Port Authority Air Terminals Are Public Fora.

In arguing that Port Authority air terminals are public fora, Plaintiffs ignore the record in this case establishing the purpose and characteristics of the Port Authority air terminals. Instead, Plaintiffs attempt to rely on secondary sources, regarding current urban planning issues and the history of other kinds of transportation facilities to establish that the Port Authority airports are public fora. Plaintiffs' discussion of secondary sources is thus irrelevant, and is, in addition, inaccurate.

Plaintiffs' reference to the alleged decline of downtown street life by the development of skyways and other street alternatives in city centers is clearly irrelevant to the issue at bar. The merits or demerits of such developments should be debated by planning commissions or zoning boards who determine the nature of our cities. *See, e.g.*, W. Whyte, *City*, 193-221 (1988). Any perceived failure of responsible planning bodies to foster the development of urban streetscapes provides no basis for holding that the Port Authority air terminals are public fora.

Plaintiffs' descriptions of wharves, Ellis Island and rail terminals are not only irrelevant to the case at bar, but are also misleading. The issue before the Court is not the public forum status of those places, today or in the past, but rather the public forum status of the Port Authority air terminals, which are very different from the historical sites discussed by Plaintiffs.

First, the public forum status of wharves, and their uses as sites of the distribution of literature, are clearly irrelevant to the case at bar because unlike air terminals, wharves "served as business streets". Brief of Petitioners and Cross-Respondents ("Plaintiffs' Brief") at 22, *quoting*, J.H. Kemble, *San Francisco Bay: A Pictorial Maritime History* 16 (1957). Furthermore, it appears that the "exchange of ideas" in colonial port districts

occurred in private places, such as clubs, coffee houses and taverns. R.D. Brown, *Knowledge Is Power: The Diffusion Of Information In Early America, 1700-1865*, 112-15 (1989).

Second, the alleged role of rail terminals as public fora is irrelevant because rail terminals, unlike Port Authority air terminals, are located in the center of a city. If the concourse of Grand Central Station or the waiting room of a small town rail depot served as a meeting place for people going about their daily business, it was because the rest of the community was a sidewalk's width away. *See* H.R. Grant & C.W. Bohi, *The Country Railroad Station in America*, 8-9 (1978); W.D. Middleton, *Grand Central* 109 (1978). Clearly, the same is not true of the Port Authority's air terminals. Although two people in Midtown Manhattan might agree to meet "under the golden clock" of Grand Central Terminal whether or not they were going to take a train, *see* W.D. Middleton, *Grand Central* 109 (1978), it is highly unlikely that two people who had no intention of taking air flights would agree to meet at any of the Port Authority airports.

Moreover, contrary to Plaintiff's assertions, as an historical matter, it is far from clear that rail stations and terminals served as public fora in the First Amendment sense. Plaintiffs fail to document that solicitation and distribution of literature actually occurred at railroad terminals. Plaintiffs also ignore the fact that railroad terminals were privately owned, and, therefore, any solicitation or distribution of literature which took place was at the pleasure of the private entities which owned the terminals. *See generally United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678, 686 (1982); H.R. Grant & C.W. Bohi, *The Country Railroad Station in America*, 11-15 (1978).[22]

Third, with regard to Ellis Island, it does not appear that it was open to all who wished to distribute literature, much less solicit. Sources relied upon by Plaintiffs reveal that some religious and other private groups were authorized to provide social services to indigent immigrants out of offices established for that

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[22] Similarly, virtually all intercity terminals in the United States are privately owned. *See* U.S. Department of Transportation, *The Intercity Bus Terminal Study*, 31 (1984) (5.8% of bus terminals are government owned).

purpose, and that literature was distributed in the course of those activities.[23] 3 National Park Service, *Statue of Liberty/Ellis Island National Monument Historical Resources Study*, 903-05 (1984); New York Bible Society, *78th Annual Report*, 7 (1902); M.J. Shapiro, *Gateway To Liberty*, 152 (1986).

Of course, such activity in air terminal immigration areas, today's analogue to Ellis Island, would be unthinkable. Entry into such areas is prohibited to all, except passengers, airline crew, law enforcement personnel and air carrier, airport and airport tenant employees bearing appropriate identification. 19 C.F.R. §§122.181-122.182 (1991).

E. Plaintiffs' Discussion of Air Terminals Does Not Establish That The Port Authority Air Terminals Are Public Fora.

Plaintiffs' discussion of air terminals completely ignores the record in this case, and instead relies only on secondary sources. Significantly, this discussion identifies no long tradition of airport terminals having served as places for the distribution of literature and solicitation of funds. Thus, although airports have existed for approximately 60 years, Plaintiffs refer to only two decades' experience of such activity. *See* Plaintiffs' Brief at 39; H.V. Hubbard, M. McClintock & F.B. Williams, *Airports: Their Location, Administration and Legal Basis*, 8 (1930) (807 airports in United States as of 1930). More importantly, the so-called "tradition" of solicitation and the distribution of literature at commercial airports has existed only because of litigation against airports, much of which was commenced by Plaintiffs. *See* Plaintiffs' Brief at 1a-1b. In essence, Plaintiffs seek to create a binding rule in this Court because of their success, except for the Second Circuit, in the lower courts. If Plaintiffs' claim were

[23] Interestingly, these activities were not always benign. Some missionaries abused their trust and assisted in the economic exploitation of immigrants. M.J. Shapiro, *Gateway To Liberty*, 153-54 (1986). In addition, in one instance, the distribution by missionaries at Ellis Island of Christian bibles, with the apparent approval of the United States government, to Jewish immigrants fleeing persecution for their religion, caused one Commissioner of Immigration to criticize the practice because it would engender fears of persecution in this country. *Id.* at 154.

accepted, it would completely undermine meaningful review of lower court decisions by this Court.

Plaintiffs also attempt to rely on secondary sources to create an impression that airports are a form of general shopping mall, and thus the facilitation of air travel is only one of many airport purposes. The most obvious error in this argument is that it completely ignores the record in this case which establishes that all planning and operational decisions and all facilities and services at Port Authority air terminals are intended to facilitate air travel and virtually all who come to the Port Authority air terminals do so for air travel-related purposes. (Superintendent's Statement, ¶¶ 41-42, 63-64 (JA 454, 459)).

Moreover, the mere presence of ancillary services for the convenience of air travellers cannot logically render airports a public forum. A hospital or courthouse does not become a public forum because it maintains a cafeteria, newsstand, or gift shop. Recently, in *Kokinda*, a plurality of this Court rejected the claim that the presence of non-postal automatic teller machines ("ATM's") in post offices rendered them public fora. *See* Supplemental Brief for Respondents, *United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115 (1990) (No. 88-2031).

Furthermore, Plaintiffs' references are misleading since the very sources they rely on make it clear that ancillary facilities at airports such as restaurants and retail stores are intended to serve *passengers*, not the general population. See Doughty, *supra* note 13, at 7; IATA Manual, *supra* note 12, §§ 3.5.5.3, 3.5.10.1; Irsfeld, *Airport Concession Reflect New Awareness of Market Demands*, Airport Services, May 1981, 40, 44;[24] McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers To Spend Money*, Wall St. J., Aug. 21, 1990, B1; Weinstein and Madrigal,

[24] "'It's true *people go to [the] airport to fly, not to eat*,' [says McDonald's Airport Development Office Manager.] But McDonald's has found that if *travelers can get a quick bite* someplace with which they're familiar and that . . . *won't make them miss their flights* or empty their wallets, they'll consider eating . . . ." Irsfeld, *Airport Concession Reflect New Awareness of Market Demands*, Airport Services, May 1981, 40, 44 (emphasis added).

supra note 14, 18-20; A.T. Wells, *supra* note 12, 154. Significantly, the most recent source relied upon by Plaintiffs describes the airport concession market as consisting *only* of the same travel related groups described as users of the Port Authority air terminals, *i.e.*, travelers, "meeters and greeters" and airline/airport employees. *Id.*; *see* Superintendent's Statement, ¶ 63 (JA 458).[25]

The fact is that airport retail services play only "a supporting role" in airport terminals. Plaintiffs attempt to rely heavily on two articles regarding airport retail services appearing in *Airport Services* magazine to give the impression that such services are the focus of air terminal activities. However, an examination of the tables of contents of that magazine over recent years belies any such conclusion since only a very few articles have been devoted to that subject.[26] In addition, more in depth studies of airport planning and management address retail services in only a cursory manner.[27]

[25] Another error made by Plaintiffs is characterizing the efforts of airport operators to restrain airport concession prices as an integration with downtown. These efforts, however, are merely intended to prevent unfair advantage being taken of the air traveler, who is a captive audience in an airport. Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, 40, 47; McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J. Aug. 21, 1990, B1 (hereinafter "McGinley").

[26] In 1989 only two of 62 feature articles were devoted to airport retail services; in 1990, only one of 48 feature articles was devoted to airport retail services; and in 1991 only two of 37 feature articles were devoted to airport retail services.

[27] *See* N. Ashford & P.H. Wright, *Airport Engineering* (2d ed. 1984) (424 page book, 41 page chapter on passenger air terminals of which 12 lines refer to concessions); N. Ashford, H.P.M. Stanton & C. Moore, *Airport Operations* (1984) (467 page book, 41 pages on passenger terminal operations of which only 3 1/2 pages (exclusive of tables and photographs) address *all* commercial activities including red cap services, telephones, parking, auto rental, as well as restaurants and other shops); R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, (3d ed. 1983) (604 page book, 77 page chapter on passenger air terminals of which only 1 page refers to retail services); P.H. Wright & N.J. Ashford, *Transportation Engineering* (3d ed. 1989) (85 pages on airports, 22 pages on passenger air terminals of which only 12 lines refer to concessions).

Even if it is true that "[r]etail facilities are currently one of the most active areas of change in the airport facility", Doughty, *supra* note 13, at 9, it is because "[t]he main things that drive passengers batty - lousy airline service, surly ticket agents and bad weather - are beyond an airport's control." McGinley, *supra* note 25. In any event, it is clear that efforts to improve ancillary facilities for the benefit of air passengers have no bearing on an air terminal's public forum status. Certainly, efforts by a hospital or courthouse administrator to improve the goods and services in her cafeteria, newsstand or gift shop are irrelevant to the public forum status of the hospital or courthouse.[28]

In sum, the presence of concessions in airport terminals does not change the fact that air terminals are non public fora because their sole purpose is the facilitation of air travel, not public assembly and debate.

[28] Similarly, Plaintiffs' description of efforts to create terminals of architectural merit and the presence of artwork in airports add nothing to the First Amendment analysis of airports. Presumably all public buildings are intended to be buildings of merit, and attempts by airports to beautify air terminals pursuant to laws mandating the expenditure of 0.5 - 1.5% of construction budgets to purchase art do not distinguish airports from any other public buildings. A General Services Administrative policy allows 0.5% of the construction fund for all federal buildings to be used for fine art. *See* Note, *Injecting a Role of Duty Into the Doctrine of Droit Moral*, 74 Iowa L. Rev. 629, 673 n.393 (1989).

POINT II

THE PORT AUTHORITY'S RESTRICTION OF SOLICITATION AND THE DISTRIBUTION OF LITERATURE TO THE SIDEWALKS ADJACENT TO AIR TERMINAL BUILDINGS IS A LAWFUL RESTRICTION OF FIRST AMENDMENT ACTIVITY IN A NONPUBLIC FORUM.

The Court of Appeals correctly applied the public forum analysis developed by this Court to hold that the Port Authority air terminals are not public fora[29], and that repetitive solicitation may be prohibited within their interiors. However, the Court of Appeals erred in holding invalid the similar Port Authority restriction on distribution of literature. It is respectfully submitted that under the decisions of this Court, both restrictions are valid because they are viewpoint-neutral and reasonable in light of the purpose of the Port Authority air terminals to facilitate safe, efficient and convenient air transportation.

A governmental entity is given much greater discretion to restrict First Amendment activities in a nonpublic forum where it is acting as a manager of facilities, than in a public forum where it is acting as a regulator. *See United States v. Kokinda*, 110 S. Ct. at 3119. Therefore, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves

[29] Plaintiffs, some *amici*, and a recent panel of the Second Circuit, *see Longo v. United States Postal Service*, __F.2d__, 1992 WL 3512 (2d Cir. Jan. 13, 1992), at 6, have stated that the Court of Appeals did not hold that the Port Authority air terminals are nonpublic fora. However, the court below specifically stated "[t]he sole issue on appeal . . . is whether the terminal areas are traditional public fora for protected speech." (PA 10). In addition, the Court of Appeals described the holdings of other lower courts that airports are public fora, and stated it was not following those decisions (PA 10-11). Finally, commentary on the Court of Appeals decision described it as holding that the Port Authority air terminals were not public fora. *See Summary of Orders*, 60 U.S.L.W. 3464 (1992); Bukowski, *Second Circuit Summaries*, N.Y.L.J., Mar. 4, 1991, 5. In any event, the public forum issue is squarely presented to this Court irrespective of one's interpretation of the Court of Appeals' opinion on that subject.

the forum for its "intended purposes" is constitutional provided the reduction does not discriminate against expressions of a particular viewpoint. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49. As held by this Court:

> "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966), *quoted in*, *Greer v. Spock*, 424 U.S. at 836.

In recognition of government's managerial role with respect to a nonpublic forum, this Court has emphasized that a viewpoint-neutral restriction on expressive activity in a nonpublic forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[30] *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 (emphasis in original). And, in a nonpublic forum, types of expressive activity can be completely prohibited.

> "[P]roperty owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment." *United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 131 n.7 (1981) (emphasis in original).

In the case at bar, the granting of broad discretion to the Port Authority to operate its air terminals is especially appropriate. The management of air terminals, indeed of airports in general, requires the exercise of detailed control over a complex environment to achieve a specific purpose – the safe, efficient and convenient facilitation of air travel.[31]

[30] Consequently, the allegation that less restrictive regulations could more precisely address the Port Authority's concerns, even if true, is not relevant to the validity of regulations in a nonpublic forum.

[31] The Port Authority's managerial, rather than regulatory, role as airport operator was recognized in an action challenging the Port Authority's

(Footnote continued)

It is evident, that the Port Authority regulations challenged herein satisfy the viewpoint-neutral reasonable test used by this Court to judge the validity of restrictions on expressive activity in a nonpublic forum. First, the Port Authority's restrictions on solicitation and the distribution of literature are viewpoint-neutral, since they apply to all solicitation and distribution of literature without regard to point of view. *See Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 806. Second, the restrictions are reasonable in view of the Port Authority's legitimate managerial interests in preserving its air terminals for the air transportation purpose to which they are dedicated.

Significantly, only two types of expression are banned in the Port Authority air terminals – repetitive solicitation and distribution of literature – since these activities have the highest adverse effects on air travelers in an airport. More specifically, solicitation and the distribution of literature exacerbate the serious problems of pedestrian congestion at one of "society's choke-points" (PA 14), result in the annoyance of air travelers who are captive audiences, create risks of fraud and generally distract police and other airport personnel from their important air travel responsibilities. *See, e.g., Heffron v. ISKCON*, 452 U.S. at 653-54; *ISKCON v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978); *International Caucus of Labor Committees v. Metropolitan Dade County*, 724 F. Supp. 917, 927 (S.D. Fla. 1989); *Gannett Satellite Information Network, Inc. v. Berger*,

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imposition of certain fees as a violation of the Commerce Clause. In that case, the District Court opinion described the Port Authority's role as follows:

> "[W]e conclude that the Port Authority's activities in determining to whom it will provide permittee services more closely resembles the activities of a merchant in the private sector. It is clear that . . . the Port Authority [is not] the market regulator in the present context . . . ." *Transport Limousine of Long Island, Inc. v. The Port Authority of New York and New Jersey*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983).

716 F. Supp. 140, 150-51 (D.N.J. 1989), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 61 (3d Cir. 1990).[32]

As held by the Court of Appeals in the case at bar, the problem of congestion is especially acute at the Port Authority airports:

> "[The] record establishes that pedestrian congestion is one of the greatest problems facing the three [airports]. Much of the facilities in question was built before [the introduction of] wide-body aircraft, and a pressing need for expansion exists." (PA 14).

And, as this Court has recognized, solicitation is very disruptive of pedestrian flow:

> "Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." *United States v. Kokinda*, 110 S. Ct. at 3123; *see Heffron v. ISKCON*, 456 U.S. at 653.

The distribution of literature has similar effects on pedestrian flow. Air passengers must alter their path to avoid the distributor, or pause to take literature and perhaps stop to read it or to throw it in a wastebin. Significantly, Plaintiff's themselves concede that "[l]iterature distribution . . . might well be as disruptive to a traveller 'hurrying to catch a plane or to arrange ground

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[32] The Port Authority's decision to restrict solicitation and leafleting to the sidewalks adjacent to the Port Authority air terminals to advance the purpose for which the air terminals were created is mirrored by the actions of other airport operators, as evidenced by the great number of reported decisions concerning such actions. *See* Brief of Petitioners – Cross-Respondents, at 1a-1b. The proliferation and persistence of this litigation reflects the continuous desire of airport operators to exercise their proprietary authority over airports with respect to expressive activity as part of their efforts to facilitate safe, efficient and convenient air transportation.

transportation' as a request for a voluntary donation." Petition for Writ of *Certiorari*, at 22 (citation omitted). And, of course, if Plaintiffs were entitled to engage in such activity, others would have the right to do so as well. As noted by this Court in *Heffron v. ISKCON*,

> "[T]he inquiry must not only involve ISKCON, but all other organizations that would be entitled to distribute, sell or solicit if the . . . rule may not be enforced with respect to ISKCON." 452 U.S. at 654; *accord*, *Clark v. Community for Creative Non-Violence*, 468 U.S. at 296-97.

The Port Authority's regulations, by limiting solicitation and distribution of literature to sidewalk areas, allows the Port Authority to control the ill effects of such activity by enabling the Port Authority to better monitor such activity by Plaintiffs and others to identify conduct that violates the law or interferes with airport operations (Sloane Supplemental Affidavit, ¶ 11 (JA 514)). The experience of the Port Authority itself, as well as of other airport operators, demonstrates the need for intensive monitoring. Port Authority records disclose that members of ISKCON have violated the existing rules under the interim agreement regarding solicitation and distribution of literature over the period 1975 through 1986, including incidents involving some form of fraud, deception, or larceny (Sloane Supplemental Affidavit, ¶ 12 (JA 514-15)). The Port Authority is also aware that members of ISKCON have engaged in misconduct elsewhere (*Id.* ¶ 13 (JA 515); Douglas Affidavit, ¶¶ 9, 16-18, 22-26 (JA 73, 77-80, 81-84)). The association of improper behavior with ISKCON's solicitation and distribution of literature has been observed by at least one federal court in *ISKCON v. Barber*, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d 430 (2d Cir. 1981), *cert. denied*, 451 U.S. 971 (1981).

Finally, the reasonableness of the restrictions at bar is demonstrated by the fact that the restrictions do not deprive Plaintiffs of access to the people who use the air terminals. More than 97% of the people who are in the terminals use the sidewalks for ingress or egress (Sloane Supplemental Affidavit,

¶ 14 (JA 515-16); Hurst Supplemental Affidavit, ¶¶ 15-17 (JA 530-32)). Thus, Plaintiffs may direct solicitation and the distribution of literature to virtually all who use the air terminal buildings, albeit outside of those buildings, and may engage those people in conversation both inside and outside of the air terminal buildings.

Based on the foregoing, it is respectfully submitted that the Port Authority's restrictions upon solicitation and the distribution of literature are valid as reasonable, viewpoint neutral-restrictions that preserve the air terminals for their dedicated purpose and serve the legitimate managerial interests of the Port Authority as airport operator in facilitating safe, efficient, and convenient air travel.

POINT III

THE PORT AUTHORITY'S RESTRICTION OF SOLICITATION AND THE DISTRIBUTION OF LITERATURE TO THE SIDEWALKS ADJACENT TO AIR TERMINAL BUILDINGS WOULD BE LAWFUL EVEN IF THE AIR TERMINALS WERE PUBLIC FORA.

Even if the Port Authority air terminals were public fora, the restriction of solicitation and distribution of literature to the sidewalks adjacent to air terminal buildings would be valid under the principles of public forum analysis.[33]

It is well established that even in a public forum, the government is not powerless to regulate First Amendment activity. Although it is true that all communication may not be excluded from a public forum, content-neutral regulations may be enforced if they are reasonable and narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. *E.g.*, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Port Authority's restriction of solicitation and distribution of literature to sidewalks adjacent to air terminal buildings satisfies this test.

First, the Port Authority Regulations are content-neutral because all solicitation and distribution of literature is treated identically, regardless of content. Any person who wishes to solicit funds or distribute literature at the airports may do so

[33] The Superintendent respectfully submits that this issue is properly before the Court, although not briefed before the Court of Appeals. The issue is within the scope of the questions presented in both the Petition for A Writ of *Certiorari* and the Cross-Petition for A Writ of *Certiorari* herein. Moreover, after briefing and argument in the Second Circuit, this Court indicated for the first time, per the concurring opinion of Justice Kennedy in *United States v. Kokinda*, __ U.S. __, 110 S.Ct. 3115 (1990), that the requisite alternative means of communication could be outside the site desired for expressive activity. *See Blonder-Tongue Laboratories, Inc. v. University Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971).

only on air terminal building sidewalks. *United States v. Kokinda*, 110 S. Ct. at 3124; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295; *Heffron v. ISKCON*, 452 U.S. at 649.

Second, as established in Point II, the Port Authority restriction on solicitation and the distribution of literature is reasonable in view of the managerial interests of the Port Authority as airport operator in facilitating safe, efficient and convenient air travel.

Third, the Port Authority restriction is narrowly tailored since it prohibits only the two types of expressive activity, repetitive solicitation and distribution of literature, which cause the most interference with air travelers. Furthermore, the restriction is narrowly tailored since it prohibits such activity only in the *interior* areas of the Port Authority air terminals. The Port Authority regulations restrict solicitation and the distribution of literature to the sidewalks adjacent to the air terminals in order to reduce the undesirable effects of such activities upon airport operations and to improve the Port Authority's ability to monitor those effects. The undesirable effects of solicitation and the distribution of literature at which the regulations are directed are increased congestion, annoyance of captive audiences, and fraud.

It should also be noted that it is untrue, as suggested by the District Court, that a regulation in a public forum is invalid because it may be possible to write a more narrowly tailored regulation (PA 45). As held by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989):

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . [a] regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Clark v. Community for Creative Non-Violence, *supra*, is also on point. In *Clark*, this Court rejected a challenge on First Amendment grounds to a National Park Service denial of permission for demonstrators to camp and sleep in Washington,

D.C. parks in order to call attention to the plight of the homeless. 468 U.S. at 291-92. The Park Service rule prohibited camping and sleeping as a way of reducing wear and tear on parks, although it permitted demonstrations 24 hours a day. *Id.* at 290, 296.

This Court reversed the holding of the Court of Appeals that the rule was invalid because less restrictive alternatives such as reducing the size or frequency of demonstrations irrespective of whether they included camping would serve the Park Service's interest in preserving the parks. *Id.* at 299. In rejecting the lower court's reasoning, this Court stated that:

> "[The Court of Appeals'] suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States v. O'Brien* or [our] time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 299 (footnote omitted).

Addressing the Park Service rule itself, this Court stated:

> "Perhaps [the Park Service's] purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But, the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out." *Id.* at 297.

Furthermore, this Court reiterated the principle recognized in *Heffron v. ISKCON*, *supra*, that the validity of a regulation is not to be determined solely by reference to the conduct of the plaintiff; rather, a rule is valid if it would prevent harm caused by the impact of the conduct of others similarly situated. *Id.*

The Port Authority regulations at issue here meet the narrowly tailored standard as applied by this Court in *Ward* and *Clark* since they reduce the undesirable effects of solicitation and distribution of literature upon airport operations and improve the Port Authority's ability to monitor those undesirable effects. Whether or not any "less-speech-restrictive-alternative", 491 U.S. at 800, regulations would achieve the Port Authority's purpose "more effectively and not so clumsily", 468 U.S. at 297, the Port Authority's regulations are lawful since they "are not substantially broader than necessary" to achieve the Port Authority's goals. *Id.*

Finally, the Port Authority's regulations leave open ample alternative means of communication. First, all types of speech other than solicitation and the distribution of literature are permitted. Second, more than 97% of the people who utilize the terminals use the sidewalks, where solicitation and distribution of literature is permitted. (Sloane Supplemental Affidavit, ¶ 14 (JA 515-16); Hurst Supplemental Affidavit, ¶¶ 15-17 (JA 530-32)).

As established by the foregoing, the Port Authority's restrictions on solicitation and the distribution of literature are content-neutral, reasonable, narrowly tailored to serve significant governmental interests and leave open ample alternative means of communication. Therefore, it is respectfully submitted that the Port Authority regulations are lawful, even if the air terminals were public fora.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit, entered February 8, 1991, insofar as it upheld the validity of the Port Authority's restriction on solicitation and reverse such judgment insofar as it held invalid the Port Authority's restriction on distribution of literature, and remand the action with instructions that the complaint be dismissed.

Dated: New York, New York
March 10, 1992

Respectfully submitted,

ARTHUR P. BERG
Counsel of Record

PHILIP MAURER

ARNOLD D. KOLIKOFF

MILTON H. PACHTER
Attorney for Respondent – Cross-Petitioner
One World Trade Center – 66E
New York, New York 10048
(212) 435-6830

Counsel for Respondent – Cross-Petitioner

Nos. 91-155, 91-339

SUPREME COURT, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF

INTRODUCTION

Airport terminals are public thoroughfares that echo the commercial and social centers of their communities. For the Nation and more than a billion travelers a year, airports are a vital crossroads, meeting place, market place and gateway. They ought to remain available for the promulgation and exchange of ideas.

The Port's resolution bans traditional modes of expression—literature distribution and solicitation of contributions. The opposite of narrow tailoring, it cannot withstand scrutiny.

Unable to deny the essential similarities between air terminals and busy urban thoroughfares, the Port resorts to defining the airports' "purpose" expediently, to include what it wants and to exclude distribution and solicitation. The New York terminals are, even in the Port's view, places bustling with activity. These characteristics, typical of the city's streets, reinforce, not detract from, the terminals' forum status.

This case does not involve security areas or places used for ticketing or baggage. Rather, petitioners seek access only to areas where travelers and non-travelers are encouraged to spend time. Petitioners have been in the New York airports for more than seventeen years, under an arrangement made months before this action was filed in 1975. During that time, no traveler has missed a flight because of a momentary pause to examine a religious book or make a voluntary contribution to Krishna consciousness. The court below erred in upholding any part of the Port's prohibition.

ARGUMENT

I. THE CHARACTERISTICS AND USE OF AIR TERMINALS MAKE CLEAR THAT THEY ARE PUBLIC FORA.

A. The Claim of Restriction to "Travel-Related Purposes" Does Not Defeat Forum Status.

The linchpin of the Port Authority's position is that the public spaces of the three New York airports "are not public fora because their sole purpose is the facilitation of safe, efficient and convenient air travel, *not* public assembly and debate." Resp. Br. 29 (emphasis in the original). For several reasons, the premise cannot stand.

First, a traditional forum is not defined by its "purpose." A few months after *Hague v. CIO*, 307 U.S. 496 (1939), the Court recognized what was in any event plain—that "the primary purpose to which streets are dedicated" is "the movement of people and property," *Schneider v. State*, 308 U.S. 147, 160 (1939). In *Hague* itself, the district court had found "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public." 307 U.S. at 505.

The Port Authority's logic, moreover, confuses traditional with designated fora. It is the latter that can be said to have an expressive "purpose." Traditional fora, on the other hand, are defined by their character and use.

The Port attempts to separate the "purpose" of a forum from its physical characteristics and use, making the former dispositive of its public or nonpublic status. The determination of a forum's purpose cannot be made in a vacuum, but "must be assessed in light of the characteristic nature and function of the particular forum involved," *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51 (1981), and the uses to which it is put. "If our public forum jurisprudence

is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in the judgment).

The Port asserts that "it is undisputed that persons use Port Authority airports only for travel-related purposes." Resp. Br. 23 (footnote omitted). Just as " 'Congress . . . may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums,' " *United States v. Grace*, 461 U.S. 171, 180 (1983), the Port Authority may not remove the airports from the public forum category by labeling whatever goes on in them as "travel-related."

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court rejected the Los Angeles airport's analogous argument that the overbreadth of its ban on "First Amendment activities" could be eliminated by construing it to affect only non-"airport-related purposes," *id.* at 576.

> The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the traveling public to "pass the time" . . . . We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who decides to "pass the time" by distributing leaflets to fellow travelers.

Id. The pliancy of the distinction impermissibly allows the Port to arrogate to itself the power to determine the *constitutional* question of whether the public areas of the airport are fora.

The Port Authority also claims that "open access to all members of the public is not inherent in the nature of, nor integral to the function of, air terminals . . . ." Resp. Br. 24. Petitioners do not purport to plumb the depths

of the question of the "inherent . . . nature" of anything. But it is undeniable that "open access" is a necessary condition to the way airports are operated today—the revenues airports derive from the 500 million nonpassengers who visit and use the facilities, not to mention the widespread public dissatisfaction that would arise from the creation of a permanent cordon sanitaire at so vital a hub, assure that. Even if airports can theoretically be closed off, so can, and are, streets or parks, which are sometimes open, for example, only to neighborhood residents or for special events.

The Port Authority relies on five other factors—"congestion," "location," "captive audiences," "financing," and "security"—to demonstrate that airports are not fora. *See* Resp. Br. 24-29. None proves the point.

Problems of congestion, captive audiences, and security can be and—at the New York airports and many others throughout the country—are easily ameliorated by time, place, and manner rules. Indeed, the points are really non-issues, as the petitioners do not seek to distribute literature or solicit contributions in the places giving rise to these concerns.

The claim that a "pedestrian delay of . . . seconds could very well cause loss of hours in travel time because of a missed plane," Resp. Br. 24, while seemingly dramatic, ignores reality. In the years in which the Port has permitted distribution and solicitation at the airports, it has been unable to document even a single case of a "missed plane" on account of these activities. The Port's generalized assertions of congestion fare no better, since, as the district court observed, under that theory, "the clogged and narrow arteries of downtown Manhattan might, as easily, be denied public forum status." App. 45, 721 F. Supp. at 578.

None of the places that the Port claims attract "captive audiences"—"enplaning and deplaning points, at ticket counters, security checkpoints, baggage conveyor

belts, and car rental and other ground transportation counters," Resp. Br. 27—are at issue. The Port relies on *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring), but this is not a case about a city bus, but, in effect one about a city—large-scale open areas and miles of walkway encompassing commercial and non-commercial facilities of every kind.

The security areas, *see* Resp. Br. 28, are also a non-issue. They are apart from general circulation areas, and the petitioners have always treated them accordingly.

The assertion that airports are not fora because they "are separated from the city streets of nearby communities by ribbons of highways," Resp. Br. 25, makes little sense. The highways are there not to "separate" the airports from, but to link them with, the whole urban infrastructure. Perhaps even less supportable is the thesis that the airports "do not serve as 'a necessary conduit in the daily affairs of a locality's citizens,'" Resp. Br. 26 (quoting *Heffron*, 452 U.S. at 651), a notion that would shock the tens of millions for whom the airports are a "conduit" of signal importance in their everyday lives.

The Port posits no logical nexus between user financing, *see* Resp. Br. 27-28, and the concept of the public forum. Regardless of the source of the airports' funding, the Port Authority's charter is to operate them as "an essential governmental function." *See* Pet. Br. 4 (quoting constitutive statutes). *United States v. Kokinda*, 110 S. Ct. 3115 (1990), cited by the Port, is inapposite since, among other things, the Port Authority is, unlike the Postal Service, not a player in a "competitive" "market." *Id.* at 3123. Metropolitan airports in New York are—like those everywhere else in the country—an office of government.

B. The Nonpublic Forum Cases Are Inapposite.

Trying to demonstrate that the petitioners "virtually ignore the public forum analysis principles enunciated by this Court," Resp. Br. 29, the Port sets up a row of straw

men. It asserts, (a) "This Court has made it clear that a place is not a public forum *merely* because it resembles a public street," Resp. Br. 29 (emphasis added); (b) "This Court has explicitly stated that a public forum does not exist *merely* because persons are freely permitted to enter a government owned site," Resp. Br. 30 (emphasis added); and (c) "[T]he usefulness of government property as a site for expressive activity does not make such property a traditional public forum . . .," Resp. Br. 31.

Petitioners do not rely on such one-dimensional, abstract claims.[1] Nor did the uniform—until this case—line of circuit authority involving major transportation centers, also wrongly disparaged as "ignor[ing] the reasoning of the decisions of this Court." Resp. Br. 32. The seminal court of appeals decision observed that "the character and function of the [Port Auhority Bus] Terminal make clear that it is a thoroughfare used by thousands of people each day." *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). Cases concerning airports used fully analogous reasoning, as did the FAA. *See* Pet. Br. 20.

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[1] The particular cases the Port cites serve it no better. *Greer v. Spock*, 424 U.S. 828 (1976), relied on "'the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command.'" *Id.* at 837 (quoting *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 893 (1961)); *see United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990) (plurality opinion) (describing *Greer*). Other cases involve places closed to general public use. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (household mail boxes); *Adderley v. Florida*, 385 U.S. 39 (1966) (curtilage of jailhouse). In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the placement of political advertisements inside city buses would have imposed upon a "captive audience." *Id.* at 304 (plurality opinion), 307 (Douglas, J., concurring). The narrow strip of pavement serving a post office parking lot in *Kokinda* is wholly unlike the massive complexes of modern air terminals. *See* Pet. Br. 36-38.

C. The Terminals Are Fora By Both Tradition and Recent Convention.

Petitioners have shown that the public spaces of airport terminals must be considered public fora "either by tradition or recent convention." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n. 32 (1984). *See* Pet. Br. 17-35. The Port Authority's efforts to refute the conclusion do not succeed.

In terms of recent convention, the FAA acknowledged over a decade ago that "[i]n recent years it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." 45 Fed. Reg. 35,314 (1980). The Port protests that petitioners "refer only to two decades' experience" out of the "approximately 60 years" that airports are said to have existed. Resp. Br. 36. A third of the total period is significant in itself; moreover, it is only in relatively recent years that airports have taken on the urban characteristics that now prevail and that continue to burgeon.[2]

Petitioners have also shown that airports are but the most recent prominent form of transportation nodes that, over centuries, have traditionally been places where ideas and information have been exchanged. The Port does not controvert this fundamental point, but instead tries unsuccessfully to nitpick some of the examples petitioners have given.

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[2] The Port says that "the so-called 'tradition' . . . has existed only because of litigation against airports, most of which was commenced by Plaintiffs." Resp. Br. 36. The claim rings hollow coming from the Port Authority, whose airports were among the many that permitted distribution and solicitation *before* any litigation. In any event, the forum status even of streets and parks has hardly been uncontested. *Compare Hague v. CIO*, 307 U.S. 496 (1939) *with Davis v. Massachusetts*, 167 U.S. 43 (1897). Municipalities continue to disclaim streets as public fora. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

The Port first contends that "reference to the alleged decline of downtown street life . . . is clearly irrelevant . . . ." Resp. Br. 34. Petitioners do not argue, however, that airports are fora *because* downtowns have declined, but point out only that this decline has been *reflected* in the increased presence and importance of analogous fora in other places, notably including airports. *See* Pet. Br. 16. Justice Kennedy has noted that, "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in the judgment). While Justice Kennedy concluded that the narrow, single-function purpose of a suburban post office—"that is, facilitating its customers' postal transactions"—justified a ban on solicitation, though evidently not on literature distribution, on the parking-lot-to-doorway ramp, *see id.* at 3126, today's airports present a different, far more complex, variegated, and interactive environment. In any event, the ban the Port has imposed is much broader than that at issue in *Kokinda*.

Next the Port asserts that "the public forum status of wharves, and their uses as sites of the distribution of literature, are clearly irrelevant to the case at bar because unlike air terminals, wharves 'served as business streets.'" Resp. Br. 34. But serving as streets and being streets are not the same thing; indeed, just as wharves once did, airports now *serve* as business streets within their context. Even if wharves and streets sometimes physically coincided, they certainly did not always do so. One of the ordinances struck down in *Schneider v. State*, 308 U.S. 147 (1939), for example, viewed streets and wharves as separable categories in its ban on handbilling "'in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee.'" *Id.* at 155. The Port also says that "the 'exchange of ideas' in colonial port districts occurred in private places, such as clubs, coffee houses

and taverns." Resp. Br. 34-35. While true as far as it goes, the Port's dip into history leaves out the simultaneous importance of public wharves in these activities. *See* Pet. Br. 22.

Similar inaccuracy characterizes the Port's argument that "the alleged role of rail terminals as public fora is irrelevant because rail terminals, unlike Port Authority air terminals, are located in the center of a city." Resp. Br. 35. It is actually the Port's claim that is irrelevant. *See Frisby v. Schultz*, 487 U.S. 474 (1988) (residential streets remote from city center were quintessential fora). In any event, as petitioners have noted, towns were often built up *around* railroad stations, Pet. Br. 26, a phenomenon repeated today as new business districts are created around airports. Contrary to the Port's apparent position, *see* Resp. Br. 35, moreover, airports are doing everything they can to attract and keep the attention of non-passengers, *see e.g.*, Pet. Br. 32-34. And the fact that the railroad stations were often privately owned, *see* Resp. Br. 35, does not gainsay the tradition carried over to metropolitan airports, all of which are publicly owned.

On its next point, the Port is compelled to feint in a different direction, but no more successfully. It does not dispute the widespread practice of religious groups' selling tracts to arriving immigrants at Ellis Island and its predecessors, Castle Garden and the Barge Office. That the authorities may have provided selective access that would be unacceptable today, what seems to be the Port's point, *see* Resp. Br. 35-36, is at best a sidelight to the central fact the transportation nodes have long been natural and appropriate places for the kinds of activities that petitioners have engaged in.

D. The Uses to Which a Forum Is Put Cannot Be Separated From Its Purpose.

Petitioners have presented extensive documentation, applicable to both the New York airports and airports nationwide, demonstrating that airports not only "facilitate," but are vital to, "the daily commerce and life" of

the communities which they serve. *Kokinda*, 110 S. Ct. at 3120. "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of government property and its customary use by the public may control the case." *Id.* at 3125 (Kennedy, J., concurring in the judgment).

Airports have become commercial and social "gathering places." While "two people in Midtown Manhattan" might not "agree to meet at any of the Port Authority airports," Resp. Br. 35, a resident of Manhattan might well meet a traveler at the business conference facility at LaGuardia. *See* Laurie McGinley, *Airports Try to Ease the Pain of Waiting with New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1.

Organizations also increasingly use airport venues like the Newark Airport Marriott Hotel for conventions and meetings, "instead of the glamour and status of a downtown hotel." Lynette Hazelton, *First Rate Conventions You Can Afford*, Black Enterprise, Mar. 1989, at 76. The reason is not that airports are isolated and remote, Resp. Br. 26-27, but because airports sites are efficient, *see* Katherine Rodeghier, *Airport Hotels Reap Day-Trip Conferences*, Crain's N.Y. Bus., Oct. 24, 1988, at 27.

Closely linked to the airport business centers is the growth of retail establishments to serve both travelers and non-travelers. Despite the Port's efforts to minimize this trend by counting articles in *Airport Services* magazine, Resp. Br. 38 n.26, the fact remains that the development of retail centers is "currently one of the most active areas of change in the airport facility." G.F. Doughty, *Review of Passenger Service Issues at Airports, in Airports for People* 9 (1988). This "striking trend," *Winged Victories*, Architectural Rec., June 1989, at 130, is not merely "ancillary" to the airports' purpose, Resp. Br. 39, but has become an integral to their function and design, *e.g.*, Paul H. Wright & Norman J. Ashford, *Transportation Engineering: Planning and Design* 622 (1989).

The impetus underlying this retail growth is that airports stand to gain from the increasing amount of time that travelers, as well as meeters and greeters and airport employees, spend in the terminals. The average passenger, for example, spends a "minimum of 45 minutes" of "dwell time" in the terminal. Greg Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, at 40. These people are not, as the Port suggests, Resp. Br. 24, frantically running along "terminal pedestrian routes" to catch a plane or arrange for ground transportation, but rather are waiting for a flight to depart.

Nor do "meeters and greeters" go to the airport strictly for "travel-related" purposes. To the contrary, "the meeter/greeter/well-wishers who come to the airport to pick up or see off passengers . . . spend a lot of time in the airport, an average of 65 minutes . . . . Those seeing travelers off come to have a meal and chat with departing customers. Those meeting arriving passengers come to the airport early and browse, shop and snack." Ira Weinstein & Juliette Madrigal, *Airport Customers and Their Needs for the 1990*, Airport Services, May/June 1991, at 18, 19.

The commercial development of airport terminals, including those at issue here,[3] confirms that while persons present in airports may spend much of their time engaged in travel related activities, a significant amount of the time is also spent in non-travel activities.

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[3] The record of this case, contrary to the Port's suggestion, Resp. Br. 36, substantiates the New York airports—the Nation's leading airport complex—as fitting solidly within this trend. Petitioners have described in detail the commercial goods, services, and amenities offered in the three airports, *e.g.*, JA 181-93. Secondary authorities are also important, however, to describe phenomena and trends nationwide, inasmuch as the outcome of this case will affect all airports. In any event, the Port acknowledges that its airports are not "atypical" of airports nationwide. Resp. Br. 23 n.14.

Price controls and other measures adopted by airports to govern such retail facilities, moreover, are not intended merely "to prevent unfair advantage being taken of the air traveler." Resp. Br. 38 n.25. Rather, the public "will find prices in the terminal competitive with about what they'd expect to pay off-airport," because of the airports' understandable preference that consumers spend their money in the airport rather than outside of it. Irsfeld, *supra*, at 42. The uses to which the Port Authority has put its terminals thus reinforce their status as public thoroughfares. Indeed, airports, including the New York area airports, have adjusted their priorities "to meet the changing customers' . . . . needs so they are viewed not just a place for airplanes, and not just as a place for passengers, but as a place for people." Weinstein & Madrigal, *supra*, at 20.

E. The Expressive Activities Permitted Under the Resolution Confirm That Airport Terminals Are Appropriate Places for the Distribution of Religious Literature and Solicitation of Donations.

Petitioners do not seek access to the airport terminals merely because they are "useful" for their activities. Resp. Br. 31. Rather, petitioners wish to distribute religious literature and solicit voluntary contributions in the airport concourses because they are public thoroughfares which provide "an appropriate place for the exercise of vital rights of expression." *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment).

Although the Port Authority regulation absolutely prohibits the distribution of literature, and the solicitation and receipt of voluntary contributions, many other forms of expression, including picketing, demonstrating, and political campaigning, are permitted so long as they do not constitute a "danger to persons or property," or "interfere" with waiting lines, pedestrian or vehicular travel, the issuance of tickets and boarding passes, luggage or cargo movement, security, government inspection proce-

dures, and cleaning, maintenance, repair and construction activities. JA 523-24.[4]

On this basis alone, there is "a powerful argument that, because of the wide range of activities that the [Port] permits to take place [in the terminals], it is more than a nonpublic forum." *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment). The Port does not deny, for example, that political campaigning, with its attendant hordes of media, supporters, staff, and security, is permitted in the New York terminals, not to speak of airports nationwide. *See, e.g.*, Bill Turque et al., *Southern Voters: Beyond Bubbas and Yellow Dogs*, Newsweek, Mar. 9, 1992, at 35; Karen De Witt, *The 1992 Campaign*, N.Y. Times, Mar. 13, 1992, at A16. Recently, President Boris Yeltsin of Russia used JFK to address the media and set the stage for his meetings with leaders of the United Nations and his summit with President Bush. *See* Robert D. MacFadden, *Leaders Gather in New York to Chart a World Order*, N.Y. Times, Jan. 31, 1992, at A1. And large demonstrations for and against controversial public figures like Prof. Leonard Jeffries of CCNY are regularly permitted in the terminals, subject to reasonable restrictions designed to avoid interference with airport operations. See Don Broderick & Marianne Goldstein, *Prof Ducks Friends & Foes at JFK*, N.Y. Post, Aug. 15, 1991, at 2.[5]

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[4] The Port asserts that the "repetitive solicitation and distribution of literature . . . have the highest adverse effects on air travelers in an airport." Resp. Br. 42. The Port, of course, provides no proof or evidence of such adverse effects, *see e.g., United States v. Grace*, 461 U.S. 171, 182 (1983) (no evidence that "appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any persons or property, or in any way interfered with the orderly administration of the building or . . . grounds"), and the record of this case is precisely the *opposite* of the Port's claim.

[5] In connection with the Jeffries demonstration, which was attended by 400 placard-waving supporters and 15 protesters *inside* the terminals, the Port Authority simply allowed Jeffries to leave the IAB through a back exit. *Id.*

Thus, although the Port Authority "may intend to impose some limitations on the [airport's] use," *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment), it is evident that the wide range of expressive activities that is permitted in airport terminals makes such facilities appropriate places for the distribution and sale of literature and the solicitation of voluntary donations from the public.

II. THE COURT BELOW ERRED IN UPHOLDING THE SOLICITATION BAN.

The Port Authority resolution prohibits both the distribution of literature and the solicitation of contributions. The panel majority below divided the ban, holding that the Port could prohibit solicitation, but not literature distribution.

The Port asserts that literature distribution has essentially the same "effects on pedestrian flow" as does solicitation, Resp. Br. 43, although it is unable to document any deleterious effects from either activity. The Port, moreover, suggests no severability. Because the Port neither distinguishes the effects of the activities nor seeks severance, the court of appeals erred in applying separate analyses to literature distribution and solicitation. Instead, it should have judged the resolution in its entirety —a total ban on both activities.

In any event, no differential impact from solicitation is of sufficient magnitude to justify the result it reached. Every form of speech has some external impacts. Yet the Constitution and common law consistently demand that such impacts be tolerated.

Minority religious organizations, like petitioners', frequently trigger official regulation, which is motivated not only by the unpopularity of their messages, *cf. Larson v. Valente*, 456 U.S. 228, 256-58 (1982) (differential regulation of solicitation designed "to get at . . . the people that are running around airports and running around streets"), but by the physical effects created by their particular means of expression.

For example, before the turn of the century, soon after the Salvation Army encamped on these shores, its noisy, cymbal-clanging, horn-playing street marches disturbed many American localities. The response was municipal ordinances banning or licensing parades with drums or musical instruments. The courts—relying more on natural or common law rights of association and assembly than on constitutional text—often struck them down. *See, e.g., In re Gribben*, 5 Okla. 379, 47 P. 1074 (1897); *City of Chicago v. Trotter*, 136 Ill. 430, 26 N.E. 359 (1891); *Rich v. City of Naperville*, 42 Ill. App. 222 (1891); *Anderson v. City of Wellington*, 40 Kan. 173, 19 P. 719 (1888); *In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886). Nor could convictions of Jehovah's Witnesses for breach of the peace stand when they carried Victrolas into Catholic neighborhoods to play virulently anti-Catholic propaganda. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). Although increased litter is an inevitable result of handbilling, the practice may not be banned to keep the streets clean. *Schneider v. State*, 308 U.S. 147, 162 (1939).

Disturbing or offensive speech must be tolerated, despite its psychological or economic impact. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (organized boycott of businesses). Free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). This Court has observed that "[m]uch that we encounter offends our aesthetic, if not our political and moral, sensibilities." *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 210 (1975).

Solicitation of funds is at the core of First Amendment protections. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1988). While the state may regulate solicitation, it may not "unreasonably obstruct or delay

the collection of funds." *See Cantwell*, 310 U.S. at 305. A ban like that at issue here is an extreme form of obstruction. Speakers are disabled from seeking support, and willing listeners prevented from effectively expressing that support.

The Court has never sanctioned a complete ban of a traditional form of protected expression in a public forum. Indeed, like a complete ban on handbilling, so too would a total prohibition of solicitation "suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crimes, litter, traffic congestion, or noise." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

The Port Authority regulation allows many forms of expression, but prohibits literature distribution and solicitation. Yet a request to donate to a particular cause is not inherently more intrusive than a request to sign a cause-related petition, or the delivery of a controversial speech. Many speakers link solicitation with the distribution of literature as a central feature of missionary evangelism. Given the Port Authority's failure to distinguish solicitation from literature distribution, an appeal for donations should be afforded equal constitutional dignity.

III. THE PORT AUTHORITY'S RESOLUTION IS NOT A REASONABLE REGULATION OF SPEECH EVEN IN A NONPUBLIC FORUM.

The Port next attempts to justify the Port Authority's total ban on literature distribution and solicitation as a reasonable regulation of speech in a nonpublic forum. Resp. Br. 40-45. The nonpublic forum cases support a more deferential standard, but not unquestioning acceptance of unsupported reasons. In cases involving the use of physical places, like *Taxpayers for Vincent* and *Kokinda*, the Court discussed at considerable length the extent to which the regulations were narrowly focused and directly connected to the governmental objectives.

In *Kokinda*, for instance, the regulation before the Court had been revised many times based on the Postal Service's long "real world" experience with solicitation at its facilities. 110 S. Ct. at 3124 (plurality opinion). The Postal Service was confronted with the administrative nightmare of drafting a rule that would apply appropriately at all of the "tens of thousands of post offices throughout the nation." *Id.* at 3122.

It is clear, *see* Pet. Br. 44-47, that the relationship between the Port Authority regulations and the interests they are alleged to serve lacks the "common sense" of the *Kokinda* rule. 110 S. Ct. at 3124. For example, even apart from the utter lack of evidence suggesting that expression has in any way exacerbated congestion, closing many uncrowded areas inside the terminals while relegating solicitation and literature distribution to the terminal exteriors, *see* Resp. Br. 42, ignores the crowded and hectic conditions from curbstone to portal. Shuttle buses, private cars, taxicabs, rental car vans, transit buses, skycaps, luggage carts and all the passengers and others using them are crowded into a few feet's width of pavement abutting moving traffic. *See* Brief Amicus Curiae of the Airports Ass'n Council Int'l at 22 (exterior sidewalks are "heavily congested areas" inappropriate for leafleting and solicitation).

Unlike the experiment with solicitation in *Kokinda*, the experience not only at the New York airports but at airports throughout the country points to the ease with which regulations short of a total ban satisfy any legitimate administrative needs. No one administrative agency is charged with regulating "tens of thousands" of airport facilities. The Port Authority and other airports are large and diverse complexes, covering square miles of land, virtual cities unto themselves. Airports are typically independent of one another, with a sizeable local administration well attuned to the particular requirements of each facility.

Because airports have been generally available for solicitation and distribution of literature for twenty years,

the experience of airport administrators fairly reflects not only the impact of petitioner's activities, but of *all* organizations that have desired to reach members of the public at airports. Thus, the concern in *Heffron*, 452 U.S. at 654, with the impact not only of one group but all possible groups has already been put to rest here.

The accumulated experience also belies the claims that petitioners in particular have caused problems requiring greater regulation. While the Port Authority points to unverified complaints during the period from 1975 through 1986, their nature and pattern is, if anything, a strong argument for the effectiveness of rules short of a total ban. For example, although there were forty complaints—overwhelmingly for technical violations—in 1976, the first full year for which records were kept, that number had dropped to *zero* in 1980. Although there were a smattering of complaints thereafter, they were almost entirely for administrative violations, like not wearing the proper identification tags or soliciting in the wrong area. In the seven years beginning with 1980, there were *no* complaints of "monetary deception" and only one complaint of "failure to identify or misrepresentation of organization." In sum, the assessment of the Deputy Director of Aviation, Morris Sloane, in 1985—that, with respect to petitioners activities, "the operation has gone fairly well"—seems more accurate than the Port Authority's belated attempt to smear the petitioners.[6]

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[6] The Port Authority's effort not only includes a highly selective characterization of the experience at the New York airports, but a citation to a 1980 district court opinion involving supposed misconduct in an entirely different setting. *See International Soc'y for Krishna Consciousness v. Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980), *cert. before appeal denied*, 451 U.S. 971 (1981), *rev'd*, 650 F.2d 430 (2d Cir. 1981); *see* Resp. Br. at 44. Even more astonishing, the Port Authority refers to an affidavit of Philip Douglas, counsel for certain airlines that have long been dismissed from the suit, in support of a motion to compel discovery. The Douglas affidavit (which was almost exclusively scurrilous hearsay) was found so irrelevant to the subject matter of this case as not even to be a basis for *discovery*.

IV. TO THE EXTENT THE ISSUE IS BEFORE THE COURT, THE PORT AUTHORITY RESOLUTION IS NOT A REASONABLE, TIME, PLACE AND MANNER REGULATION.

The Port, finally, seeks to justify the ban on distributing literature and soliciting donations as a valid regulation of speech in a public forum.[7] Without ever using the phrase, "time, place or manner," the Port argues that its restrictions "are reasonable and narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication." Resp. Br. 46.

The present ban is far more sweeping than a time, place or manner rule. In the two cases upon which the Port primarily relies, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), far narrower rules were upheld that permitted substantial access to the forums in question. In *Clark*, a rule against camping was upheld against the claim that it interfered with demonstrators' sleeping in parks—which the Court assumed to be a kind of symbolic speech connected with a demonstration on behalf of the homeless. The rule, however, allowed 24-hour-per-day demonstrations, including tents erected in Lafayette Park, to continue uninterrupted, as long as the demonstrators remained awake. In *Ward*, the question was not whether rock music performances would be permitted in a particular arena, or even whether the volume of those performances could exceed a certain level, but whether the City of New York had chosen a reasonable means to enforce a maximum volume level.

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[7] The Port admits it has not previously claimed that the Port rule was a valid, content neutral regulation of speech in a public forum, either in the trial court or the court of appeals. Resp. Br. 46. Instead, the Port has previously argued that the airports were not public fora, and has implicitly conceded that, if the airports *were* public fora, its regulation would be invalid. Therefore, the record does not permit a full consideration of whether the ban is a valid time, place or manner regulation, and the issue is not properly before the Court.

Here, by contrast, the Port Authority regulations ban *all* literature distribution and *all* solicitation from the terminal areas otherwise open to the public. These are, moreover, forms of expression not, like rock music and sleeping in the parks, near the periphery of the Free Speech Clause, but at its core.

Content neutrality, *see* Resp. Br. 46-47, cannot alone validate the Port's resolution. If it could, the public forum doctrine would be vitiated. Nor does the supposed availability of sidewalks outside the terminal as an alternative forum, *id.* at 47, advance the Port's cause with respect to the interior areas. As the district court noted, "plaintiffs have consistently limited their demands to the interior of the terminal buildings only." App. 35, 721 F. Supp. at 574. "[I]n defining the forum, we have focused on the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985).

Nor may it fairly be said that the Port Authority resolution is narrowly tailored. Resp. Br. 47. The interests claimed—congestion, annoyance of captive audiences, and fraud—are more than adequately addressed by other means, both in New York and elsewhere.

CONCLUSION

The public forum doctrine powerfully supports "the intellectual freedom which is essential to the progress of truth." *Cf.* Lord Acton, *Essays on Freedom and Power* 244 (Peter Smith 1972) (1948). This rationale of the court below would rob the doctrine of much of its force and deny to citizens significant opportunities for expression. The judgment should be reversed to the extent it upholds the Port Authority's resolution.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
ROBERT C. MOEST
FLEISHMAN, FISHER & MOEST
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 557-1077

DAVID M. LIBERMAN
2049 Century Park E.
Suite 3160
Los Angeles, CA 90067
(310) 277-9288

JAY ALAN SEKULOW
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, DC 20007
(202) 337-2273

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
LEVY, GUTMAN, GOLDBERG & KAPLAN
275 Seventh Ave., Suite 1776
New York, NY 10001
(212) 807-0733

Counsel for Petitioners and Cross-Respondents

March 19, 1992

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MULTIMEDIA NEWSPAPER COMPANY, THE GREENVILLE NEWS-PIEDMONT COMPANY, THE ASHEVILLE CITIZEN-TIMES COMPANY, THE ADVERTISER COMPANY, LEAF-CHRONICLE COMPANY, BAXTER COUNTY NEWSPAPERS, INC., OHIO VALLEY PUBLISHING COMPANY, THE OBSERVER PUBLISHING COMPANY, AND STAUNTON LEADER PUBLISHING COMPANY IN SUPPORT OF AFFIRMANCE IN PART OF THE OPINION BELOW

CARL F. MULLER
Counsel of Record
WALLACE K. LIGHTSEY
WYCHE, BURGESS, FREEMAN & PARHAM, P.A.
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602-0728
(803) 242-3131
Counsel for the Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The companies listed below, through their undersigned counsel, respectfully move the Court for leave to file a brief *amici curiae*. The brief is not in support of either petitioners or respondent, but rather in support of partial affirmance of the opinion below.

The petitioners have consented to the filing of the brief; their letter of consent has been filed with the Clerk of Court. The respondent has refused such consent.

Movants are the owners of local newspapers of general circulation in various parts of the South and the Ohio Valley. Movants have an interest in the outcome of this proceeding because they consider the distribution of their newspapers in their communities' public airports to be of great import in their respective locales. Hence a decision by the Court in this case on the question whether the public areas of public airports are pub-

lic forums is of substantial concern to movants, both financially and philosophically.

Movants have reason to believe that the parties to this action may not present the facts or matters of law addressed in the within Brief *Amici Curiae*. In contrast to petitioners, movants seek only to distribute newspapers in public airports through vending machines, a passive means of distribution. Because petitioners also seek to solicit funds through active, personal interaction with people in airports, movants' perspective may be broader and perhaps more moderate than that of petitioners. In contrast to respondent, movants do not believe that all First Amendment activity in public airports should be left to the bureaucratic discretion of airport management, limited only by a "reasonableness" standard of judicial review.

For these reasons, the undersigned respectfully request the Court to grant leave to file the within Brief *Amici Curiae*.

Respectfully submitted,

CARL F. MULLER
Counsel of Record
WALLACE K. LIGHTSEY
WYCHE, BURGESS, FREEMAN & PARHAM, P.A.
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602-0728
(803) 242-3131
Counsel for the Amici Curiae

Movants:

Multimedia Newspaper Company, The Greenville News-Piedmont Company, The Asheville Citizen-Times Company, The Advertiser Company, Leaf-Chronicle Company, Baxter County Newspapers, Inc., Ohio Valley Publishing Company, The Observer Publishing Company, and Staunton Leader Publishing Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-155, 91-339

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF *AMICI CURIAE* IN SUPPORT OF PARTIAL AFFIRMANCE

The undersigned respectfully submit this Brief *Amici Curiae* in support of neither petitioners nor respondent, but rather in support of affirming that part of the opinion below which held invalid the respondent's prohibition of the distribution of literature in the public areas of the airports.

INTEREST OF THE *AMICI CURIAE*

The *amici* are nine companies that publish daily and non-daily newspapers across the South and in the Ohio Valley. Included within this group are the publishers of the *Asheville Citizen-Times*, the largest newspaper in western North Carolina; the *Montgomery Advertiser* and *Alabama Journal*, the daily newspapers of the capital of Alabama; and *The Greenville News* and *The Greenville*

Piedmont, the largest newspapers in upstate South Carolina. The group also includes newspaper publishers of lesser size, such as the publisher of the *Daily News-Leader* in Staunton, Virginia, and the *Daily Sentinel* in Pomeroy-Middleport, Ohio. Though united under a common parent headquartered in South Carolina, they are all published independently.

The *amici* submit this brief not in favor of any of the litigants to this appeal, but rather in support of the proposition that public areas of public airports are public forums under the First Amendment. Regardless of the Court's determination of the other issues on appeal, it is of great importance to the *amici* for the Court to affirm the correctness of this proposition.

Through "an unusual consensus of judicial, legislative, and administrative opinion", *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983), virtually every court to address this issue has held that the public areas of public airports are public forums.[1] Yet not every state or federal circuit has been called upon to make that determination. For this reason, the issue, though litigated many times with virtually the identical result in every case, will continue to be litigated in the future until this Court plainly states its position.

---

[1] *See also, e.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Fernandes v. Limmer*, 663 F.2d 619, 626-27 (5th Cir. 1981), *cert. denied*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924-26 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Gannett Satellite Information Network, Inc. v. Berger*, 716 F. Supp. 140, 149 (D.N.J. 1989), *aff'd on this ground and rev'd in part on other grounds*, 894 F.2d 61 (3d Cir. 1990); *Chicago Tribune Co. v. City of Chicago*, 705 F. Supp. 1345, 1347-48 (N.D. Ill. 1989).

Were the issue of only passing legal significance, litigation of the same issue, with the same result time after time, would be no more than grist for the lawyers handling those cases and for those who rightly complain of our courts being clogged with unnecessary matters.

But this issue is more. It is not only of constitutional dimension, but it also arises under the First Amendment, which this Court has recognized many times as requiring special solicitude. More importantly, it affects not just the Krishnas, or some other relatively small but noticeable element of our society. It affects everyone, including newspaper publishers of the type which have submitted this brief, because virtually everyone in this country uses the public areas of public airports many times during the courses of their lives. Those who ask to use these areas as public forums for legitimate First Amendment purposes should not be put to the considerable delay and enormous expense of protracted court battles to determine an issue that is as settled in the law as any can be without a clear statement from this Court. Those who have no such aims, but instead would simply hear or see the proffered communication, are entitled either to have it and have it promptly, or else to have the comfort of knowing that its denial was not the result of an airport manager's decision to use the public treasury to fight a battle that has been fought and lost elsewhere many times.

ARGUMENT

THE PUBLIC AREA OF A PUBLIC AIRPORT IS A PUBLIC FORUM.

The defining characteristics of a public forum are, first, that it be a place where people gather, and second, that it be an appropriate place for the expression and discussion of issues and ideas by the public at large. It is an unfortunate fact that the streets and parks of our country do not serve the same role for public gathering, discussion, and debate today as they did in 1791. Apart from privately owned shopping malls (in which the property owner may substantially restrict expressive activity[2]), increasingly today the public gathering places are governmentally owned transportation centers, such as bus terminals, railroad stations, and in particular, airports. In most cities today, the town square is a desert compared to the local public airport. The airport serves as a meeting place for businessmen and friends, a location for public announcements by political candidates and government officials, and a place where the public may shop, eat, have a drink, or sit and watch the airplanes or the people. In functional terms, the airport is an essential part of the daily commerce and movement of people, capital, and ideas in our local communities. All this is true not just of large airports such as the ones involved in the instant action, but also of the many smaller regional airports located throughout the country.

In evaluating whether such a gathering place is an appropriate locale for the free expression and discussion of issues and ideas by the public at large, two paramount concerns must be addressed: whether such freedom of expression would significantly undermine or threaten the legitimate primary activities of the facility, and whether, because of the physical structure of the facility, members of the public who use it for its primary purpose might

[2] *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

be forced to endure for more than a passing moment communications which they would prefer not to receive.

It is for these reasons that military bases and street cars are not public forums. *See Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). It is for these reasons also that a narrow sidewalk leading only from a parking lot to a post office may not be a public forum, either. *See United States v. Kokinda*, —— U.S. ——, 110 S. Ct. 3115 (1990).

For these same reasons, the public area of a public airport is a public forum. Experience has shown that allowing it to be used for expressive purposes—subject to proper time, place, and manner restrictions—will not threaten or undermine the primary purpose of the airport. Further, the physical structure and customary use and features of the typical airport eliminate any possibility that it can be used by speakers to foist an unwanted message on a captive audience. The typical public airport is open, spacious, bustling, noisy, readily accessible to the public at large, and composed of a multitude of passageways on different levels.[3] It is quite common for public airports to contain banks, restaurants, lounges, outdoor terraces, gift shops, travel agencies, rental car bureaus, and numerous public seating areas, restrooms, and telephones—in short, precisely the types of commercial establishments and public facilities that one encounters on the streets of the local community. Vast numbers of people are freely admitted to public airports, and admission is not restricted to those who wish to use them solely in connection with air travel. Public airports function as major public thoroughfares and, for hundreds of millions of people a year, are the gateways to and from their respective communities.

[3] *Cf. Lehman*, 418 U.S. at 303 ("Here, we have no open spaces . . . or other public thoroughfare.") (plurality opinion).

In one of the formative decisions on public forums, the Court of Appeals for the Second Circuit described the physical characteristics of the Manhattan bus terminal that made it a public forum, using language directly applicable to public airports:

> "Unlike an office building corridor or an apartment house hallway, the people are not simply using the connecting passageway to reach a place where they engage in different, more pacific or reflective activities. They are in the Terminal for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its 'streets' in effect set atop one another, . . . not unlike some futuristic design for urban living."

Wolin v. Port of New York Authority, 392 F.2d 83, 89 (2d Cir.) (citation omitted), *cert. denied*, 393 U.S. 940 (1968).[4]

In short, all of the physical and functional characteristics of the airport make it an appropriate place for

[4] *See also U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766-67 (D.C. Cir. 1983) (distinguishing airport terminal from streetcars involved in *Lehman*); *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 579 F. Supp. 90, 96 (S.D.N.Y.) ("[U]nlike the streetcar in *Lehman*, [a commuter rail station] is not unduly confined, and contains waiting rooms, concourses, passageways, and platforms that are in many ways analogous to the street corners and meeting halls which are the traditional public forums."), *rev'd on other grounds*, 745 F.2d 767 (2d Cir. 1984).

the free exercise of speech and press, subject to such restrictions as are permissible in public forums.

> "The first amendment is not an abstract proposition; our society's commitment to free speech must exist in fact as well as in principle. In fact, the open, public areas of [the public airport] have become contemporary crossroads in which millions of people each year engage in a considerable amount of commercial, social, and political interchange. As the FAA itself recognizes, 'in many respects, the terminals are like any other public thoroughfare where there is no question that the constitutional guarantee[] of freedom of speech . . . app[lies].'"

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 774 (D.C. Cir. 1983) (quoting 45 Fed. Reg. at 35,314) (brackets in original).

If public forum analysis is to retain its vitality in a changing society, the notion of the "traditional public forum" cannot be confined to streets and parks *per se*, and no Supreme Court precedent suggests that it should be so confined. To the contrary, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court noted that traditional public forums are "those clearly held in trust, either by tradition *or by recent convention*, for the use of citizens at large." *Id.* at 815 n.32 (emphasis added).

If public forums exist only in the streets and parks and in those places which the government has devoted to unrestricted communicative activity, the continued existence of the public forum will come to rest wholly in the hands of the government as the streets and parks cease to be natural gathering places.[5] Such a result is

[5] The streets and parks themselves did not become public forums because the government opened them up for unrestricted expressive activity by the public; they became public forums because they were the natural gathering places of the people and because they were appropriate places for free expression and discussion. A colonial

fundamentally at odds with the First Amendment. Justice Kennedy cautioned in his opinion concurring in the judgment in *United States v. Kokinda*:

> "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.
>
> ". . .
>
> "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case."

Id. at ——, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment). As discussed above, both the "objective characteristics" and the "customary use" of the typical public airport give it the status of a public forum.

Recognition of the public areas of public airports as public forums will not mean the end of public air travel in a safe, orderly, and enjoyable manner. The government may regulate expression in a public forum. All that is required is that the regulation be content neutral, that it relate to the time, place, or manner of expression, that it be narrowly tailored to serve a significant governmental interest, and that it leave open adequate alternative channels of communication. *E.g., Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2746, 2753 (1989). Under this rule of law, airport managers have ample means to keep out bullhorns to limit the numbers of contemporaneous speakers, and to restrict or perhaps even prohibit highly intrusive personal solicitations of alms.

This country has drawn its strength and spirit from a free exchange of ideas, and often that exchange has

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patriot who wished to stir up the crowd against the British would use a street or park because he would have an audience there, not because the British allowed speeches in the streets and parks.

occurred in public forums. Often it has not been altogether pleasant at the time, but ultimately it has been good for our country and her people. Two centuries ago that exchange occurred on the commons of New England towns. Three decades ago it occurred on the sidewalks and statehouse grounds and in the bus stations of the South. As the lives of our people have changed, so too have their public forums, as indeed they must if the public forum is to serve effectively as the instrument of liberty which it always has been and always shall be under the First Amendment.

CONCLUSION

The Court should hold that the public area of a public airport is a public forum and affirm that part of the opinion below which invalidated respondent's prohibition of the distribution of literature.

Respectfully submitted,

CARL F. MULLER
Counsel of Record
WALLACE K. LIGHTSEY
WYCHE, BURGESS, FREEMAN & PARHAM, P.A.
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602-0728
(803) 242-3131
Counsel for the Amici Curiae

Amici:

Multimedia Newspaper Company, The Greenville News-Piedmont Company, The Asheville Citizen-Times Company, The Advertiser Company, Leaf-Chronicle Company, Baxter County Newspapers, Inc., Ohio Valley Publishing Company, The Observer Publishing Company, and Staunton Leader Publishing Company

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

Nos. 91-155 & 91-339

IN THE

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OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners,

vs.

WALTER LEE, Superintendent of Port Authority Police,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN TRACT SOCIETY, CHRISTIAN ADVOCATES SERVING EVANGELISM, FREE SPEECH ADVOCATES AND CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

THOMAS PATRICK MONAGHAN
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

CHARLES E. RICE
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556
(219) 239-5667

JAMES MATTHEW HENDERSON SR.
Counsel of Record
MARK N. TROOBNICK
1000 Thomas Jefferson Street NW
Suite 520
Washington, DC 20007
(202) 337-2273

Attorneys For Amici Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. Whether the distribution of free religious literature may be prohibited from public concourses of Port Authority Airports?

2. Whether the distribution of free religious literature is a form of expression which is compatible with the environs of the public concourses of Port Authority Airports?

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Brief Amici Curiae Of The American Tract Society, Christian Advocates Serving Evangelism, Free Speech Advocates and Concerned Women For America In Support Of Petitioners

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INTEREST OF THE AMICI IN THIS CASE*

Amici are organizations involved actively either in the production and distribution of free religious literature or in the defense of the right to distribute free religious literature in public places.

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* Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

Amici share a common view that hand-to-hand distribution of free religious literature is an efficacious means of communicating with members of the public about such matters. Amici oppose the contention of Respondent that prohibiting the free distribution of religious literature from the public concourses of Port Authority Airports is a reasonable means of promoting the safe and convenient use of the Port Authority Airports.

The American Tract Society ("the Society") was founded in May, 1825, "to provide improved efficiency and greater economy in proclaiming the Gospel through the printed page in tract form."[1] Through its efforts in creating, printing and circulating religious materials, principally religious tracts, the Society has sought:

> to diffuse a knowledge of our Lord Jesus Christ as the Redeemer of sinners and to promote the interests of vital godliness and sound morality, by the circulation of Religious Tracts, calculated to receive the approbation of all Evangelical Christians.

ARTICLE I, *Constitution and By-Laws* at 1 (American Tract Society 1825). In its 166-year pursuit of this goal, the society has circulated over one billion leaflets.[2]

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[1] Dissertation by Stephen E. Slocum, Jr., *The American Tract Society: 1825-1975, An Evangelical Effort To Influence the Religious And Moral Life Of The United States* at 234 (New York University School of Education 1975) (hereafter cited as "Slocum").

[2] *Slocum, supra* n.1, at 238.

Christian Advocates Serving Evangelism ("CASE") and Free Speech Advocates are dedicated to the ideal that religious freedom and freedom of speech are inalienable rights given by God. CASE and FSA were formed to educate, and where necessary, to litigate on issues affecting the right to bear public witness to the Gospel. The commitment of CASE and FSA to the constitutional rights necessary for effective public evangelism has resulted in application of this Court's Public Forum Doctrine in a variety of public, nontraditional settings: beaches, state-owned resorts, college campuses, public secondary schools, national monuments, publicly owned coliseums, public bus terminals, and metropolitan rapid transit terminals.

Concerned Women for America ("CWA") is a national, nonprofit organization representing approximately 700,000 people. The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

The amici joined in this brief urge the Court to uphold the right to distribute free religious literature in such public places as the Port Authority Airport Terminals.

SUMMARY OF ARGUMENT

Analysis of the right to distribute free religious literature in the Port Authority's Airport Terminals proceeds in three steps, *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985), identifying the nature of the speech and the nature of forum, and then evaluating the challenged

regulation or practice in light of the kind of speech and the kind of forum.

In the case of the distribution of free religious literature, the unquestioned rule is that distributing free religious literature is a protected form of expression. With remarkable consistency,this Court has noted the constitutional value of religious leafletting in a line of cases from *Lovell v. City of Griffin*, 303 U.S. 446 (1938) to *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The courts below disagreed on the nature of the forum at issue here. The district court concluded that the Port Authority's Airport Terminals were traditional public forums. *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989). The second circuit, initially inclined to agree with the district court, ultimately concluded that the Airport Terminals were nonpublic forums from which the free distribution of religious literature could not reasonably be banned. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576 (2d Cir. 1991). The second circuit's conclusions, both as to the nonpublic forum status of the Airport Terminals and as to the unreasonability of a complete prohibition on leafletting therein, are attributed by that court to this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 111 L.Ed.2d 571 (1990).

While these amici do not read *Kokinda* as announcing the startlingly new public forum analysis that the second circuit below attribute to it, it is clear that whether the district court was correct, or the second circuit, distribution of free religious literature is an inherently less disruptive form of speech than many others. Thus, even in a nonpublic forum, a complete

prohibition of leafletting activities would be unreasonable.

ARGUMENT

The Port Authority of New York and New Jersey has promulgated a regulation, Rules and Regulations of the Port Authority of New York and New Jersey, Chapter III, Part B, which provides:

> B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.

Petitioners, the International Society for Krishna Consciousness and Brian Rumbaugh brought the action below to challenge the constitutionality of Rules and Regulations of the Port Authority of New York and New Jersey, Chapter III, Part B. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 577 (2d Cir. 1991). Under Rules and Regulations

of the Port Authority of New York and New Jersey, Chapter III, Part B, a principal religious duty of the Petitioners known as *Sankirtan* cannot be conducted in the public areas of the Port Authority's Airport Terminals, even though the public is freely admitted to these areas. *Sankirtan* includes aspects both of charitable solicitation and distribution of religious literature. 925 F.2d at 577-78.

Both at trial and on appeal, Petitioners succeeded in their challenge to the Port Authority's prohibition of leafletting. The district court struck the leafletting ban after concluding that the Port Authority's Airport Terminals were traditional public forums. *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989). The second circuit also reached the conclusion that leafletting could not be prohibited in the Airport Terminals, although it did so on the basis that the complete prohibition of leafletting in the nonpublic forum terminals was, *inter alia*, unreasonable. 925 F.2d at 582.

Even in the wake of this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 111 L.Ed.2d 571 (1990), there remains a well-established framework for analyzing conflicts between governmental regulation and otherwise protected expression. Analysis of the right to distribute free religious literature in the Port Authority's Airport Terminals proceeds in three steps. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985). First, this Court must determine whether the distribution of free religious literature is speech protected by the First Amendment. *Id.* Next, this Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, this Court must determine whether the Port Authority's asserted justifications for a flat ban on free distribution of written materials satisfy the pertinent constitutional standards. *Id.*

Application of the Public Forum Doctrine framework here leads ineluctably to the same result, with respect to the right to distribute free religious literature, as reached by the United States Court of Appeals for the Second Circuit below.

I. DISTRIBUTION OF FREE RELIGIOUS LITERATURE IS WELL-RECOGNIZED AS A CONSTITUTIONALLY PROTECTED FORM OF EXPRESSION.

As a preliminary matter, the parties, and the court below, agree that the distribution of free religious literature is a form of expression protected by the First Amendment. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 579 (2d Cir. 1991) ("[t]he Port Authority does not dispute that . . . distribution of religious literature [is] protected speech with the meaning of the First Amendment") (citations omitted).

This Court's consistent jurisprudence, for fifty years, recognizes the free distribution of literature as a form of expression protected by the United States Constitution. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 446 (1938) and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).[3] In-

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[3] The fact that Petitioners' solicit donations while distributing literature does not alter this conclusion. In *Heffron*, 452 U.S. at 647, this Court noted that the First Amendment protections afforded to "the oral and written dissemination of . . . religious

deed, in *Lovell*, this Court put the case for constitutional protection of leaflets and pamphlets quite clearly:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to *the vital importance of protecting this essential liberty from every sort of infringement* need not be repeated.

Lovell, 303 U.S. at 452 (emphasis added) (citations omitted).[4]

Of course, the constitutional value of leaflets and broadsides is not lessened by the fact that they address matters of religion. The pamphlets at issue in *Lovell*, religious in nature, were "a pamphlet and magazine in the nature of religious tracts. . . ." 303

views and doctrines" is not "lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith." 452 U.S. at 647 (and cases cited therein).

[4] An excellent discussion of the effective use of pamphlets, tracts and broadsides, by Whigs, in fomenting the American Revolution, is found in Davidson, Propaganda and the American Revolution at 209-23 (UNC Press 1941). Tories seldom, if ever, made effective use of tracts, pamphlets and broadsides, to reason with their fellows or to calm secessionist fervor. *Id.* at 310-11, 332-33.

U.S. at 448. Just five years after *Lovell*, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1942), this Court said:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

Murdock, 319 U.S. at 108-09 (1943) (footnotes omitted).

Beyond cavil, Petitioners' literature distribution activities warranted the constitutional protections accorded them below. Indeed, so plain is the right, and so valuable the liberty, that this Court must act, if at all, only with the closest inspection, as it reviews this matter.

II. WHETHER THE PORT AUTHORITY'S AIRPORT TERMINALS ARE TRADITIONAL PUBLIC FORUMS OR NONPUBLIC FORUMS, THE PORT AUTHORITY'S BAN ON DISTRIBUTION OF FREE RELIGIOUS LITERATURE DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

A. THE PORT AUTHORITY'S PUBLIC AIRPORT TERMINALS, ESSENTIAL PUBLIC THOROUGHFARES IN THE LIVES OF THE COMMUNITIES THEY SERVE, ARE TRADITIONAL PUBLIC FORA.

The district court below correctly decided that the Port Authority's Airport Terminals are traditional public forums. As long ago as the case of *Hague v. CIO*, 307 U.S. 496 (1939), this Court recognized that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (plurality opinion).

Streets, sidewalks, and parks represent the "quintessential public forums." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). On the range of properties open in varying degrees to expressive activities, streets and parks lie at the very "end of the spectrum," *id.*; hence, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' " *Members of City Council of Los Angeles v.*

Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (citations omitted). Thus, " 'public places' historically associated with the free exercise of expressive activities,such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " *United States v. Grace*, 461 U.S. 171, 177 (1983) (and cases cited).

The district court, *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989), and the second circuit, *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576 (2d Cir. 1991), disagreed on the appropriate classification for the Port Authority's Airport Terminals (ultimately, however, they agreed that the Port Authority's complete prohibition on leafletting was untenable). The district court's conclusion that the Airport Terminals are traditional public forums cannot be manifestly unreasonable—the second circuit noted that, until this Court's decision in *Kokinda*, it was "prepared to follow" the rule established in other circuits on the public forum status of airport terminals. 925 F.2d at 580 (citing *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981); *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987); and, *Jews for Jesus, Inc., v. Board of Airport Commissioners*, 785 F.2d 791 (9th Cir. 1986)).

A reasonable determination of the public forum status of the Port Authority's Airport Terminals cannot be made without examining the facts revealed by the record. *Kokinda*, 497 U.S. at ___, 111 L.Ed.2d at 583 ("the location and purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum"). In the present case, the district court found the public areas of the

Port Authority Airport Terminals to "possess the characteristics of a bustling metropolitan boulevard." 721 F. Supp. at 576. Based on the facts in the record, the district court concluded that the public terminals were "the functional equivalent of public streets." 721 F. Supp. at 577.[5]

The facts in this case fully support the district court's conclusion. As the *Kokinda* plurality suggested, the role of the disputed situs in "the daily commerce and life of the neighborhood or city" is an essential factor in the public forum determination. *Kokinda*, 497 U.S. at ___, 111 L.Ed.2d at 570. Here, no rational person could justifiably assert that these Port Authority Airport Terminals are places insignificant in "the daily commerce and life" of the region served by the Port Authority Airports. Indeed,

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[5] The district court had before it the findings of a magistrate who had, on the facts and law, concluded that the Petitioners were entitled to summary judgment on their complaint. Appendix to the Petition for Certiorari at 72 (hereinafter cited as "App."). The magistrate's findings of fact amplify the correctness of the district court's conclusion that the Port Authority Airport Terminals were traditional public forums:

> [the] interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please. . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (citations and internal quotation marks omitted).

Respondent urged that its Cross-Petition be granted, at least in part, because airports "play a vital role in providing transportation to the nation." Cross-Petition for A Writ of Certiorari at 18.

Nor is the district court's conclusion inconsistent with this Court's prior holdings. When reviewing an asserted right of access for purposes of free expression, the crucial question is typically whether the forum at issue is sufficiently analogous to municipal sidewalks and streets so as to constitute a public forum. *E.g., Grace*, 461 U.S. 171 (sidewalk on perimeter of Supreme Court grounds indistinguishable from other city sidewalks); *Marsh v. Alabama*, 326 U.S. 501 (1946) (sidewalks and streets of company town indistinguishable from municipal sidewalks and streets); *Flower v. United States*, 407 U.S. 197 (1972) (per curiam) (street and adjoining sidewalks through military facility indistinguishable from municipal thoroughfare); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping mall not functional equivalent of municipality); *Heffron*, 452 U.S. 640 (state fairgrounds significantly different from municipal streets).

Nor does the fact that the terminals are controlled and operated by the Port Authority dispose of the otherwise correct conclusion that the terminals are traditional public forum property. Technical ownership of the terminals, is irrelevant: "[*w*]*herever* the title of streets and parks may rest," *Hague*, 307 U.S. at 515 (emphasis added), these properties are "freely accessible and open to the people in the area and those passing through," *Marsh*, 326 U.S. at 507. It is this openness "for indiscriminate use by the general public," *Perry*, 460 U.S. at 47, this "traditional right

of access," *Taxpayers for Vincent*, 466 U.S. at 814, that characterizes public forum property.

Nor is it dispositive that the Port Authority's Airport Terminals lack a two hundred year history of use as traditional public forums. It is simply not in keeping with this Court's precedents to argue that a particular public property must have a history of specific expressive activities before it can be considered a public forum. In *Marsh* and *Flower*, there was no indication that other individuals had previously distributed literature on the sidewalks in question. In *Grace* and *Hague*, the Court saw no need to inquire whether previous demonstrations of any sort had taken place at the sites in question. Indeed, in *Hague*, there was "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public," 307 U.S. at 505; this Court nevertheless ruled that streets and parks have, "time out of mind," been used for purposes of free expression, *id.* at 515.

Such a site specific inquiry, demanding proof of an established history of prior use, proves too much. Under such an approach, any newly incorporated municipality could avoid the strictures of the Constitution merely by constructing its public thoroughfares and parks in places where none had existed previously. Thus a ban on leafletting on that property, while certainly offensive to *the* Constitution would not offend *notions of history*. Such artifice cannot stand in for constitutional principle.

From the foregoing, it is plain that the facts of this case are in clear contrast to those of this Court's nonpublic forum cases, particularly *Perry*, *United States Postal Service v. Council of Greenburgh Civic*

Ass'ns, 453 U.S. 114 (1981), *Greer v. Spock*, 424 U.S. 828 (1976), *Adderley v. Florida*, 385 U.S. 39 (1966), and *Kokinda*.

The *Perry* case involved an interschool mail system, 460 U.S. at 38-39, and *Council of Greenburgh Civic Ass'ns* involved residential mailboxes, both nonpublic fora strikingly different from public sidewalks and streets.

In *Greer*, the disputed forum was the United States Army post at Fort Dix, New Jersey. 424 U.S. 828. The "special constitutional function of the military in our national life," 424 U.S. at 837, taken together with "the historically unquestioned power of [the base] commanding officer summarily to exclude civilians from the area of his command[,]" 424 U.S. at 838 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961)), and the fact that the military command at Fort Dix had never "abandoned any claim of special interest" in controlling the conduct of visitors to the base, 424 U.S. at 837, led ineluctably to the Court's conclusion that Fort Dix was not a public forum. *Greer* itself acknowledged "the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks. . . ." *Greer*, 424 U.S. at 835.

In *Adderley*, this Court found no constitutional warrant to overturn convictions for trespass resulting from a demonstration held on nonpublic grounds of a Florida county jail. In *Adderley*, "the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff." 385 U.S. at 41. The jailhouse driveway was "not normally used by the public, but by

the sheriff's department for transporting prisoners to and from the courts . . . and by commercial concerns for servicing the jail." 385 U.S. at 45.

In this case, the district court found that the airport terminals "possess the characteristics of a bustling metropolitan boulevard." 721 F. Supp. at 576. In *Adderley*, the forum was nonpublic because it was reserved for internal governmental operations; here, the fora are traditionally public and the record is devoid of objective indicia suggesting that the sidewalks are reserved solely for internal governmental operations.

Finally, the analogy to the *Kokinda* case actually *undercuts* the Port Authority's arguments. In *Kokinda*, this Court addressed the forum status of certain postal service property:

> the Bowie post office is a free-standing building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use th[at] sidewalk to enter the post office. Th[at] sidewalk belongs to the post office and is used for no other purpose.

111 L.Ed.2d at 579 (citation omitted). The sidewalk along Route 197 was the "municipal sidewalk," which could be and was used for pedestrian access up and down Route 197. The other sidewalk, the post office

walkway, was constructed wholly within and on the post office property. That post office sidewalk was constructed for one purpose only, to provide a means of ingress and egress for postal patrons. 111 L.Ed.2d at 579, 582.

Unlike that postal sidewalk, the Port Authority Airport Terminals serve the myriad, nongovernmental purposes of their countless users. Beyond the private purposes of their airline passengers, the Terminals are shop-lined avenues open to the public and inviting the commercial interest of the public.

Thus, the district court correctly concluded that Port Authority Airport Terminals were traditional public fora. Having correctly determined the nature of the forum, the court turned to the issue of the ban on the distribution of religious materials. Here again, the district court concluded consistent with this Court's precedents that "the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." 721 F. Supp. at 579.

The district court's holding was plainly correct. The interests asserted by the Port Authority are no more powerful or carefully tailored to the regulation at issue than were the interests this Court found insufficient in *Grace*. Furthermore, the Port Authority's flat ban on leafletting also fails the compelling government interest standard.

The Port Authority's regulation prohibits all free distribution of written material. This flat ban applies throughout the airport terminals. When a governmental entity, including the Port Authority, under-

takes to prohibit an entire class of expression from a traditional public forum, its decision is subject to the most stringent examination. *Grace*, 461 U.S. at 177 ("[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to achieve a compelling interest"); *see also Kokinda*, 110 S. Ct. at 3119 (plurality) ("[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny").

The Port Authority's ban on leafletting is just such an absolute prohibition on a type of expression. As such, it cannot be a "reasonable" time, place, or manner regulation. In a long line of cases, this Court has consistently struck down such sweeping prohibitions of cherished First Amendment speech. In *Board of Airport Commissioners*, 482 U.S. 569, for example, this Court held unconstitutional a regulation which prohibited all free speech activities in an airport terminal. As this Court explained, "we think it obvious that such a ban cannot be justified even if [the airport terminal] were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 575. Thus, this Court has already disposed of the possibility that a compelling interest exists to justify a flat prohibition on speech.

Nor has the Port Authority narrowly tailored its prohibition to achieve the goal of "safe, efficient and effective management" of the Airport Terminals. The complete prohibition of leafletting shows no sensitivity toward the rights of expression that it squelches. Rather than focusing on abusive practices, such as

obstructing passages or fraudulent solicitations, the Port Authority has banned the quiet leafletter with the noisome hawker of wares. Surely the Port Authority does not claim to be powerless to reach and proscribe disorderly conduct, unsafe movement or violence. The flat ban simply fails to distinguish between protected and unprotected activities. This minimal tailoring, a basic prerequisite for restrictions on free speech, is absent from the Port Authority's regulation.

Lacking a compelling interest, or even a significant interest, and having in addition failed to tailor its regulation to the asserted interests, the Port Authority has no basis for objection to the district court's decision below.

B. EVEN IN A NONPUBLIC FORUM, A TOTAL BAN ON LEAFLETTING IN AREAS OF PUBLIC AIRPORT TERMINALS OTHERWISE OPEN TO THE PUBLIC WOULD BE UNCONSTITUTIONAL.

Initially, the second circuit below was inclined to affirm the district court's conclusion that the airport terminals were traditional public forums. Between its initial consideration and the issuance of its opinion, however, this Court decided *Kokinda*. As understood by the second circuit court, *Kokinda* worked a substantial modification of this Court's Public Forum Doctrine, which modification compelled the conclusion that the airport terminals were nonpublic forums in which a flat ban on leafletting was unreasonable.

Even if these airport terminals were not traditional public fora, which was the conclusion of the second circuit below, the Port Authority's complete prohibition of leafletting is still unconstitutional under the standards applicable to nonpublic fora, as the second

circuit held. Viewed "in light of the purpose of the forum and all the surrounding circumstances," *Cornelius*, 473 U.S. at 808, a flat ban would be manifestly unreasonable here.

First, as the second circuit correctly concluded, this Court's decision in *Kokinda* turned on the distinction between in-person solicitation and leafletting. *International Society for Krishna Consciousness*, 925 F.2d at 582. The second circuit's analysis of *Kokinda* led it to conclude that a ban on the distribution of free literature would be unconstitutional. 925 F.2d at 582.

An apparent majority (the dissenting justices together with the concurring justice) considered the distribution of free literature to be a protected activity, even in a nonpublic forum. As the second circuit below stated:

> With regard to the . . . ban on the distribution of literature, we read *Kokinda* as looking in a different direction. The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of leaflets. They would therefore allow the latter in the [property] in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of

> funds and the lesser inconvenience of the distribution of literature in upholding the . . . regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation and leafletting in upholding the regulation. There was thus a majority, and perhaps more, that would allow the latter.

925 F.2d at 582 (citations omitted).[6]

Second, there was no evidence to support the Port Authority's hypothesis that permitting leafletting might jeopardize or disrupt the safe, efficient and effective management of these airports. Rather, the Port Authority relied upon speculation, an undifferentiated fear, to support its conclusion that noncommercial leafletting would disrupt the transportation purposes of the terminals. The Port Authority failed

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[6] In this respect, *Kokinda* and the second circuit decision below are consistent with this Court's reasoning in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). In *Grayned*, this Court focused on the "nature of a place, 'the pattern of its normal activities' " in seeking to define a reasonable regulation of time, place and manner. 408 U.S. at 116 (footnote omitted). As this Court indicated, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* The Port Authority leapfrogged past this key point of analysis and drew, without considered proof, the regulatory conclusion that all leafletting is completely incompatible with normal airport terminal activity at all places and at all times.

to prove that permitting the free distribution of literature would destroy the Airport Terminals. On this point, of course, both the district court and the second circuit were in agreement.

Third, given the purpose and circumstances of the airport terminals, an absolute prohibition of all leafletting would be patently unreasonable. These airport terminals bear all the indicia of city sidewalks, including heavy pedestrian use and attendant noise as well as adjacent commercial enterprise. App. 70-71; 721 F. Supp. at 576. Nor was the bare act of handing someone a piece of literature, inside the Port Authority Airport Terminals, shown to be somehow destructive of the Terminals.

There is no ready nexus between the "evils" of leafletting assertedly feared by the Port Authority and the flat ban; hence, the ban on all distribution of written material is unreasonable. A reasonable regulation is one which targets no more than the evil to be avoided. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

The Port Authority can cite no authority to support its implicit view that leafletting is a cognizable evil. Thus, even if the Port Authority's Airport Terminals were nonpublic fora, the complete prohibition of leafletting would remain manifestly unreasonable and unconstitutional.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Second Circuit, to the extent that it

permits the free distribution of religious literature in the public concourses of the Port Authority Airports.

Respectfully submitted,

THOMAS PATRICK MONAGHAN
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

CHARLES E. RICE
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556
(219) 239-5667

JAMES MATTHEW HENDERSON SR.
Counsel of Record
MARK N. TROOBNICK
1000 Thos. Jefferson Street NW
Suite 520
Washington, DC 20007
(202) 337-2273

Attorneys For Amici Curiae

February 14, 1992

Nos. 91-155 and 91-339

FEB 14 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and BRIAN RUMBAUGH,
Petitioners and Cross Respondents

v.

WALTER LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE,
Respondent and Cross Petitioner

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; ADVANCE PUBLICATIONS, INC.; GANNETT CO., INC.; GLOBE NEWSPAPER COMPANY; THE NEW YORK TIMES COMPANY; AND THE WASHINGTON POST IN SUPPORT OF PETITIONERS

ROBERT C. BERNIUS *
ALBERT SHULDINER
DEBORAH A. TARASEVICH
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle
Suite 800
Washington, D.C. 20005
(202) 457-5300

ALICE NEFF LUCAN
4403 Greenwich Parkway, N.W.
Washington, D.C. 20007
(202) 298-7210

Attorneys for Amici Curiae

* Counsel of Record

(Additional Counsel Listed Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS FOR INDIVIDUAL AMICI CURIAE

RENÉ P. MILAM
American Newspaper Publishers Association
P.O. Box 17407 Dulles Airport
Washington, D.C. 20041

BARRY N. STEINER
RICHARD A. BERNSTEIN
Advance Publications, Inc.
SABIN, BERMANT & GOULD
350 Madison Avenue
New York, New York 10017

BARBARA WARTELLE WALL
Gannett Co., Inc.
1100 Wilson Boulevard
Arlington, Virginia 22209

CATHERINE E.C. HENN
Globe Newspaper Company
135 Morrissey Boulevard
Boston, Massachusetts 02107

JOHN C. FONTAINE
CRISTINA L. MENDOZA
Knight Ridder, Inc.
and
JANET L. HUMPHREYS
KOZYAK, TROPIN, THROCKMORTON & HUMPHREYS
200 South Biscayne Boulevard
Miami, Florida 33131

GEORGE FREEMAN
KENNETH A. RICHIERI
The New York Times Company
229 West 43rd Street
New York, New York 10036

CAROL D. MELAMED
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

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PRELIMINARY STATEMENT

Amici curiae submit this brief, on consent of all parties, in support of Petitioner International Society for Krishna Consciousness, Inc. ("ISKCON"). At issue in this case is the extent to which the First Amendment

protects expressive activities within the public areas of airport terminals controlled by the Port Authority of New York and New Jersey.

In its Cross-Petition for Certiorari, the Port Authority contends that the court below held that the airport terminals were not public fora. Cross-Petition for Writ of Certiorari at i, 11. However, the Second Circuit did not address that issue:

> In our recent decision in International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576 (2 Cir. 1991), we did not reach the issue of whether airport terminals are traditional, designated, or non-public fora.

Longo v. United States Postal Service, —— F.2d ——, 1992 U.S. App. LEXIS 280, page 5 (2d Cir. 1992).

Should this Court nevertheless choose to decide the public forum issue, *amici* urge it to hold that Newark, LaGuardia and JFK airports are traditional public fora, suitable for "communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Whatever the mode of analysis undertaken by the Court, however, *amici* request it to take into account the following discussion.

INTEREST OF THE AMICI CURIAE

Amici are newspaper publishers and a trade association that represent the entire spectrum of newspaper companies in the United States. On an average day, the newspapers represented by *amici* circulate to more than 56 million readers.

Today, more newspaper readers rely on "single-copy" purchases, as opposed to home-delivered newspaper subscriptions, than ever before. Each day, thousands upon thousands of airport travelers, employees and visitors

buy a newspaper at airports throughout the nation. *Amici*'s ability to reach those readers adequately, and thus to sustain the "flow of information . . . to the public," *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), depends in significant part upon the airports' status as public fora.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION ("ANPA") is a non-profit trade association representing approximately 1,300 member newspapers. Its membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. Because airport circulation reaches those readers who might not otherwise receive a newspaper, ANPA's members have a keen interest in judicial decisions, such as that of the court below, which relate directly or indirectly to newspaper distribution.

ADVANCE PUBLICATIONS, INC., directly and through subsidiary corporations, publishes newspapers in twenty-two cities throughout the United States, publishes thirteen magazines with nationwide circulation, operates sixteen cable systems across the country, and owns a major national book publishing company. These companies distribute their publications extensively at airports. Advance Publications, Inc. has found that many thousands of people who travel through, congregate in or work at the nation's airports purchase news and other written information there.

GANNETT CO., INC. and its subsidiaries publish 81 daily, and a variety of non-daily, newspapers. Total circulation of the daily newspapers amounts to over 6.2 million, of which 38%, or about 2.4 million, are single-copy sales.

THE WASHINGTON POST, published in the District of Columbia by The Washington Post Company, is a daily newspaper of general circulation, averaging about 800,000 daily circulation and 1.1 million Sunday circulation.

Approximately twenty-five percent of the *Post's* daily sales are through single-copy outlets.

THE NEW YORK TIMES COMPANY publishes *The New York Times* and 32 other daily or weekly newspapers. Of *The New York Times'* 1,114,830 daily circulation, approximately 51% are sold as single-copy.

GLOBE NEWSPAPER COMPANY, publishes *The Boston Globe*, a newspaper of general circulation that circulates in the Boston metropolitan area. During the six months ending in September of 1991, the *Globe's* average paid daily circulation was 504,675, of which 38% was attributable to single-copy sales.

KNIGHT-RIDDER, INC. is parent to 25 newspapers with a combined daily circulation of 3,555,338. Out of that, single-copy sales amount to 34.8%, or 1,237,848 readers on a daily basis. Philadelphia Newspapers, Inc. publishes *The Philadelphia Inquirer* and the *Philadelphia Daily News*, and both are members of the Knight-Ridder group. The *Daily News* is sold almost entirely in single-copy purchases. The combined average daily circulation of both newspapers is 711,639, and of that 537,429, or 75%, of their readers obtain the newspapers by single-copy sales.

SUMMARY OF ARGUMENT

Since pre-Revolutionary times, newspaper readers have been able to buy newspapers on the streets and in other public passageways. The ability freely to distribute along such public thoroughfares, including contemporary air terminals, is more than ever crucial to the survival of newspapers, and depends upon the protections afforded by the public forum doctrine.

Open without restriction to the public, major air terminals are communities in their own right, in which broad ranges of commercial and expressive activities take

place. The Port Authority air terminals are accordingly public fora, in which governmental interests and First Amendment activities can be accommodated by the enforcement of appropriate time, place or manner regulations.

ARGUMENT

POINT I

MAJOR AIRPORT TERMINALS ARE ESSENTIAL LOCATIONS FOR THE DISTRIBUTION OF NEWSPAPERS AND ARE PUBLIC FORA

The right to distribute the news is indispensable to the freedom of the press, and is fully protected by the First Amendment:

> Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.

In re Jackson, 96 U.S. 727, 733 (1878). The right to distribute finds support not only in the press' right to publish, but also in the public's right to receive information. *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Constitutional protection is undiminished by the fact that a newspaper is sold, rather than given away. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Since the earliest days of this nation, newspapers have been sold to readers on a day-by-day basis, now commonly referred to as "single-copy" sales. Single-copy sales are essential to the survival of newspapers, and have long been an integral part of the daily pattern of activity in airport terminals. It is therefore appropriate and important that this Court hold that the Port Authority's airport terminals are public fora, where distri-

bution of newspapers and other literature will remain fully proected by the First Amendment, subject to appropriate time, place or manner restrictions.

A. Non-Subscription, Single-Copy Newspaper Distribution at Airports is Crucial to Amici

Amici circulate newspapers in significant part through single-copy distribution. Their ability to do so is critically dependent upon the protections afforded them by the public forum doctrine.

Public streets and sidewalks are the most often cited examples of traditional public fora. In large measure, the "tradition" which is a principal characteristic of public fora is that of newspaper distribution. A presence on the public streets and sidewalks, for the purpose of distributing newspapers, antedates the Constitution.[1]

So-called "newsboys" aided in the distribution of patriotic literature during the Revolution.[2] The practice of selling newspapers on the public streets became more widespread during the 1830's with the development of a popular "penny press" which, unlike more established newspapers of the day, relied on street sales for the bulk of its distribution.[3] Before motorized transportation would revolutionize newspaper distribution, street hawkers were essential to the success of newspapers of every size.[4] Although there is no reliable way to estimate their numbers, from all accounts there were huge numbers of "newsies" on the streets and sidewalks in every sizeable

[1] Whisant, *Selling the Gospel News, Or: The Strange Career of Jimmy Brown the Newsboy*, 5 J. Soc. Hist. 269, 273 (1972); F. Mott, *American Journalism: A History 1690-1960* 106 (3d ed. 1967).

[2] A. Lee, *The Daily Newspaper in America: The Evolution of a Social Instrument* 26 (1937).

[3] M. Schudson, *Discovering the News: A Social History of American Newspapers* 22 (1981).

[4] D. Nasaw, *Children of the City* 168 (1985).

city.[5] In the larger cities, hawkers would place themselves outside department store exits, in front of subway stations, by commuter train stops, wherever they could be sure to meet with potential readers. In the words of one historian, "in those helterskelter days of journalism between the Spanish-American War and World War I, the newsies shouting the headlines were as much a part of the urban scene as the lampposts on every corner." [6]

Newsboys' shouts are now less common then they once were. Single-copy distribution in public fora, however, has increased. Most American readers now have access to more than one newspaper, even though the number of metropolitan daily newspapers has seriously declined. More and more readers have turned to single-copy purchases, rather than obtain their newspapers through home subscription. Readers have done so for varied reasons, with access, convenience, and flexibility being chief among them.

Thus those who read newspapers increasingly tend to read more than one. Most readers buy that second newspaper directly, not by subscription. Single-copy sales have accordingly become the most important means of circulation for newspapers seeking to become a "second read," as well as for those readers who, because of choice or lack of opportunity, do not have home delivery.[7]

Other factors also contribute to a trend away from regular subscriptions and an increasing popularity of single-copy purchases. Urban commuters find it easier to

[5] *See id.* at 69-71; *L. Ashby, Saving the Waifs: Reformers and Dependent Children, 1890-1917* 253 n.4 (1984).

[6] D. Nasaw, *supra* note 4, at 78.

[7] Daily home delivery falls below the 50% mark for a number of demographic groups, including those with family incomes below $10,000, the unmarried, renters, and those under 30. *See* Newspaper Advertising Bureau, Inc., *Circulation and Home Delivery Patterns* (Nov. 1983).

buy a newspaper at or on the way to work, or simply defer reading a newspaper until they return home in the evening. Young adults tend to be more eclectic than their elders when purchasing newspapers. For those who do not read a newspaper every day, single-copy purchasing is more efficient: some buy the newspaper only on Wednesdays, when food coupons are included; on Fridays, for the weekend entertainment edition; or daily, depending on which alternative publication they wish to read. For these buyers, the convenience of home subscription (when it is available) does not offset the flexibility of choosing when and what newspaper to read.[8]

Finally, some readers buy newspapers only when newsworthy events draw their attention. Major news developments lead directly to intensified reader interest and increased single-copy purchases. For example, USA TODAY sold 640,185 more copies the day after the Persian Gulf War started than had been sold on the same day the week before. Most of *amici*'s newspapers also increase their next-day sales after, for example, elections or significant sports events.

Single-copy newspaper sales are accordingly crucial to the survival of newspapers. Newspapers with circulations in excess of 200,000 sell 34% of their papers to single-copy purchasers. For most papers with circulations of 500,000 and above, the percentage of single-copy purchases is even higher: single copy buyers of USA TODAY, for example, represented 53.15% of the newspaper's 1.9 million daily purchasers in 1991.[9]

As air travel has mushroomed, single-copy newspaper distribution—itself a central characteristic of public fora

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[8] W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News* 271-72 (1987); "Single Copy Sales," *Presstime* 6 (July 1984).

[9] *See* International Circulation Managers Association, *ICMA Update*, June 1991; American Newspaper Publishers Association, *Executive Summary: Creative Marketing Strategies* 1 (Oct. 1986).

—has evolved such that airport circulation has assumed ever-increasing importance to *amici* and their readers. Once citizens simply bought their newspaper from a newsboy as they walked down the street or sidewalk. Later, commuters picked up their daily paper at rail stations or bus stops to read on the bus or train. Now they do so at the airport: considerable numbers of the millions and millions of travelers who annually pass through the Port Authority's three airport terminals buy a newspaper to read on the plane, to read while waiting for a plane or for an arriving passenger, to learn about local events or breaking news on their arrival, or to read as part of their ordinary daily routine as one of the airports' thousands of employees.

Port Authority argues that growth in air travel, with its attendant crowding of airports, counsels a finding that airports are not public fora. Cross-Petition for Writ of Certiorari at 16. To the contrary, that same explosive growth in air travel confirms the critical importance of airport terminals as sites for the distribution of newspapers. For example, fourteen million people annually buy USA TODAY at airports, a figure that represents 5.5% of its total annual sales.

The greater the numbers of people who pass through airports and airport terminals as part of their daily life, the greater their need and desire to be supplied there with timely news and information.[10] Newspapers should continue to have the constitutional ability to meet that need, protected by the public forum doctrine.

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[10] For large numbers of travelers, particularly those who are simply changing planes, the airport terminal is the only location at which they can purchase a local newspaper. For example, 55% of the millions of passengers in Dallas-Fort Worth airport transfer from one plane to another. *Fernandes v. Limmer*, 663 F.2d 619, 624 n.4 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and thus have no practical ability to leave the terminal to buy a newspaper.

There is no question that airports may, and have, imposed appropriate time, place and manner regulations to ensure that congestion problems, safety hazards, and other compelling airport needs are met. *Amici* make every effort to balance airports' legitimate interests with their own need to reach their readers, and have safely, successfully and without controversy achieved that accommodation at the vast majority of the nation's 483 air traffic "hubs" and "nonhubs." *Amici* claim no First Amendment right, for example, to block the flow of passengers in a crowded airport corridor in order to distribute a newspaper. Airports are, however, fully capable of achieving their legitimate operational objectives through appropriate time, place and manner regulations, tailored to the special needs of particular airport facilities: the "character [of the airport] may well inform the application of the relevant test, but it does not lead to a different test." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

B. Airport Terminals are Contemporary "Streets and Sidewalks"

Travelers boarded airplanes more than 438,000,000 times in 1990. According to the FAA, that passenger volume will increase by 3.8 percent annually over the next ten years.[11] The numbers at the Port Authority airports are similar: 79,000,000 travelers in 1986, with an anticipated 110,000,000 travelers by 2000. Cross Petition for Writ of Certiorari at 4.

Today's town square or city park may be deserted, but the airport almost never is. As airports have increased in size and sociological significance, their terminals have assumed the functional and physical characteristics of streets and sidewalks and have become the contemporary public forum: open, public thoroughfares surrounded by

[11] FAA, U.S. Dep't of Transportation, Pub. No. FAA-APO 91-1, *FAA Aviation Forecasts: Fiscal Years 1991-2002*, at 7 (Feb. 1991).

diverse commercial activities and peopled by members of a community carrying on business and personal activities of every description.

> [T]he open, public areas . . . have become contemporary crossroads in which millions of people each year engage in a considerable amount of commercial, social and political interchange.

U.S. S.W. Africa/Namibia Trade and Cultural Council v. U.S., 708 F.2d 760, 774 (D.C. Cir. 1983).

Airport managers once had only to support flights with baggage, fuel and the sparest of passenger conveniences; not a small task, but nonetheless one that focused on flight operations. Now airports, including those of the Port Authority, have become large commercial centers;[12] they have expanded and diversified their facilities to meet public demands wholly distinct from the need to board a plane.

Airports engage in sophisticated marketing research to maximize the commercial potential of the population which daily passes through them.[13] Joining the traditional barber shops, post offices, and travel bureaus are specialty gift shops and even department stores: in 1986, two Bloomingdale's outlets opened at the Port Authority's JFK Airport.[14] The diversity of commercial activity along airport corridors and thoroughfares mirrors the range of activity on any public street: the ubiquitous airport McDonalds, Pizza Huts and Burger Kings are joined, for example, by the more idiosyncratic slot machines in Reno, and USO facilities in Philadelphia.

[12] Parr, "*We enterprised it*," *Forbes*, Nov. 16, 1987, at 302.

[13] Vyn, "Airports Sold on Marketing to Building Concession Projects," *Marketing News*, June 5, 1989, at 2.

[14] Ralston, "Airport Retailing Takes Off," *Venture*, May 1988, at 38.

This wide range of activities inside airport facilities has nothing to do with making flights more safe or guaranteeing their on-time operation. It results instead from airport managers recognizing what their counterparts—other business people abutting other public sidewalks and thoroughfares—recognized long ago: pedestrians have money and are willing to spend it.[15]

Of course most airports are still situated many miles from the population centers they serve, but they are not isolated (as suggested by the majority below) any more than any other suburban commercial center is "isolated" from the inner city. For many (if not most) travellers, the large airport terminal presents the only practical location at which to shop for local products. Thus airports have encouraged stores selling "local flavor, local products, and businesses offering innovative services that make passengers' time in the terminal seem less interminable," [16] such as an airport Texas barbecue eatery in Dallas, a lobster-to-go stand in Boston,[17] or an Ozark handcrafts store in St. Louis.[18] The core elements of the downtown community have simply moved, or expanded, to the airport terminal.

Clearly the large airport no longer merely supplies food, rest stops and telephones, or simply gets planes off the ground.[19] Passengers who have to wait an hour or two for their plane want all of the services and amenities they can get, "to transact more business while they have this time—and they want to read, eat and watch

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[15] Parr, *supra* note 12, at 298.

[16] Ralston, *supra* note 14, at 38.

[17] *Id.* at 39.

[18] Dunkin, "Airport Shopping Gets an Upgrade to First Class," *Business Week*, March 6, 1989, at 55.

[19] Finney, "The New Appetite for Airport Food," *Airport Magazine*, July/August 1991, at 12.

television." [20] Passengers provide a key airport marketing opportunity, but are only part of the population at the airport. Airports also seek retail business from those accompanying passengers: "these meeters and greeters often have a lot of time to kill, while the passenger checks in or gets his luggage." [21]

C. First Amendment Activities are Characteristic of Airports

The diverse range of airport enterprises also typically includes a wide array of expressive activities. All major airports welcome bookstores and newsstands at which books, magazines, newspapers and other periodicals are sold. Major terminals contain display advertising and permit the distribution of pamphlets, advertising materials, and public interest publications. Some airports actually publish news and information themselves. For example, Metropolitan Washington Airports Authority has its own airport community magazine, *The Washington Flyer*. Newark International Airport also has its own newsletter, the *Newark Int'l Airport Beacon*, which is distributed in its public areas and is addressed primarily to its 14,000 employees. The *Beacon* includes news, poetry, artwork and classified advertising, and serves as a forum for discussing public issues such as the problem of aircraft noise [22] or the problem of the homeless at the airport.[23] The Port Authority also publicly distributes *Flying Times*, a newsletter in which the Newark International Airport Manager himself recognized that Newark airport is a self-contained:

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[20] Gite, "Your Ticket to High-Flying Profits," *Black Enterprise*, March 1991, at 58.

[21] Vyn, *supra* note 13, at 2.

[22] *Newark Int'l Airport Beacon*, April/May 1988, at 1.

[23] *Newark Int'l Airport Beacon*, June/July 1988, at 1.

> community with all the functions, the friendships and the opportunities that that implies. [Newark International Airport] is like your hometown. —We have a bank, a pharmacy, a barbershop and a lot of people pulling together to make it all work. [Newark International] is also part of the communities that surround it. Over the last 60 years, these communities and the airport have grown together. The airport has become an important economic anchor, generating jobs, new business and above all, opportunities.

The Port Authority of N.Y. and N.J., *Flying Times*, Vol. 4, No. 4, at 1 (1988).

Thus it is that major municipal airports are themselves communities, with all the characteristics of downtown retail areas. Indeed, they have in many respects supplanted the downtown streets and parks—now frequently deserted and dangerous, and available for speech only theoretically—as appopriate fora for free expression. Airports are major commercial crossroads, where the streets, highways and pathways on the gound intersect with the "highways of the air." As "society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in judgment).

D. The Port Authority Air Terminals are Traditional Public Fora

In *United States v. Kokinda*, *supra*, the plurality concluded that the "purpose" of a public facility "is critical in determining whether" it is a public forum. *United States v. Kokinda*, *supra*, 110 S. Ct. at 3121. The Port Authority accordingly argues that airports are not public fora because their "sole purpose is to facilitate air travel." Cross-Petition for Writ of Certiorari at 5.

The Port Authority's interpretation of *Kokinda* would, of course, support an equivalent claim that sidewalks are not public fora because their "sole purpose is to facilitate foot travel" or that streets are not public fora because their "sole purpose is to facilitate vehicular travel." In that regard, then, the Port Authority misreads the plurality's rationale in *Kokinda*.

The terminals at issue in this case are public passageways, to which access is unrestricted and through which citizens pass to eat, to shop, to spend time watching planes (or people) come and go, to fill prescriptions, or to do myriad other things in addition to travelling beyond the airport. *See Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). Unlike those who traversed the special purpose post office sidewalk in *Kokinda*, those who visit major air terminals do so for a host of different reasons, not "solely" to get on or off a plane.

Moreover, in *Kokinda* the reason for *travel* upon the postal sidewalk was itself for a narrow and specific purpose: the sidewalk existed "solely to assist" access to the Post Office to transact postal business, *not* to "facilitate the daily commerce and life of the neighborhood or city." *United States v. Kokinda*, *supra*, 110 S. Ct. at 3120. To the contrary, people who travel to, from or through the Port Authority's airport terminals do so as an indispensable part of the "daily commerce and life" of New York City; they travel not solely to transact postal business but to engage in the entire spectrum of personal and business activities, both at the airport terminals and beyond.[21] *Kokinda*, then, simply cannot be read to support the conclusion that the terminals are not public fora.

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[21] In fact, the statutory purpose of the Port Authority's air terminals is set out in extraordinarily expansive terms, *i.e.* Port Authority air terminals are established 'for the benefit of the people of the states of New York and New Jersey," "for the increase of their commerce and prosperity, and for the improvement of their health and living conditions." N.Y. Unconsol. Laws

Amici do not claim that all airport terminals are public fora. A sidewalk may not, because of its location and purpose, be a public forum for speech because it is located on a military base, *Greer v. Spock*, 424 U.S. 828, 838 (1976), or within a postal facility, *United States v. Kokinda*, *supra*. Similarly, some air terminals located on military bases, *see United States v. Albertini*, 472 U.S. 675 (1985), or the special purpose Memphis Federal Express terminal (and its counterpart run by the United States Post Office), would presumably not be public fora because of their distinctive location and narrow purpose. Yet here, where access to airport terminal thoroughfares and passageways is unrestricted, where those passageways abut expressive and commercial activities of a range far beyond those which abut most American streets and sidewalks, where thousands and thousands of people daily congregate, and through which all walks of people travel for wholly unrestricted purposes, the terminal is "clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Members of the City Council v. Taxpayers for Vincent*, 446 U.S. 789, 815 n.32 (1984). Most assuredly the exercise of First Amendment freedoms is protected in the Port Authority's terminals by the public forum doctrine, for expressive activities are fundamentally compatible with the normal daily activities undertaken there, and can be accommodated to the airports' legitimate needs through appropriate time, place or manner regulations. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

CONCLUSION

The court below held that the Port Authority's ban on the distribution of literature (as distinct from in person solicitation) in its air terminals was unconstitu-

§ 6634 (McKinney 1979 & Supp. 1992); N.J. Stat. Ann. § 32:1-35.4 (West 1990 & Supp. 1991).

tional. *Amici* urge this Court not only to uphold the conclusion that the distribution of literature in the Port Authority terminals is appropriate, but also to hold that the Port Authority terminals are traditional public fora, in which First Amendment activities may be limited only by appropriate time, place and manner restrictions. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Respectfully submitted,

ROBERT C. BERNIUS *
ALBERT SHULDINER
DEBORAH A. TARASEVICH
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle
Suite 800
Washington, D.C. 20005
(202) 457-5300

ALICE NEFF LUCAN
4403 Greenwich Parkway, N.W.
Washington, D.C. 20007
(202) 298-7210
Attorneys for Amici Curiae

RENÉ P. MILAM
American Newspaper Publishers Association
P.O. Box 17407 Dulles Airport
Washington, D.C. 20041

BARRY N. STEINER
RICHARD A. BERNSTEIN
Advance Publications, Inc.
SABIN, BERMANT & GOULD
350 Madison Avenue
New York, New York 10017

* Counsel of Record

BARBARA WARTELLE WALL
Gannett Co., Inc.
1100 Wilson Boulevard
Arlington, Virginia 22209

CATHERINE E.C. HENN
Globe Newspaper Company
135 Morrissey Boulevard
Boston, Massachusetts 02107

JOHN C. FONTAINE
CRISTINA L. MENDOZA
Knight Ridder, Inc.
and
JANET L. HUMPHREYS
KOZYAK, TROPIN, THROCKMORTON &
HUMPHREYS
200 South Biscayne Boulevard
Miami, Florida 33131

GEORGE FREEMAN
KENNETH A. RICHIERI
The New York Times Company
229 West 43rd Street
New York, New York 10036

CAROL D. MELAMED
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

Nos. 91-339 and 91-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

- and -

WALTER LEE,
Cross-Petitioner,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. AND BRIAN RUMBAUGH
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PROJECT VOTE, PEOPLE FOR THE AMERICAN WAY, AND FAMILIES U.S.A., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ELLIOT M. MINCBERG
SONIA A. BACCHUS
PEOPLE FOR THE AMERICAN WAY
2000 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036

ROBERT PLOTKIN
Counsel of Record for the Amici Curiae
ELINOR L. COLBOURN
ANDREW J. STEINBERG
2000 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036
(202) 467-2392

QUESTIONS PRESENTED

1. Whether the public concourses of airport terminals are public forums presumptively available for free speech in which the Port Authority's blanket prohibition against leafletting is unconstitutional.

2. Whether the Port Authority's sweeping ban on distribution of literature in the public concourses of its airport terminals is unconstitutional under a non-public forum analysis.

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INTEREST OF THE AMICI CURIAE

Project VOTE is a nationwide, non-partisan organization which seeks to increase civic participation by communicating with, educating and helping register to vote millions of Americans who have not previously participated in elections, particularly low-income and minority citizens. Since its creation in 1982, Project VOTE, working with local coalitions, has registered over 1.4 million new poor and minority voters, resulting in praise and support from Republicans and Democrats alike. One of Project VOTE's most important and effective activities is to work in conjunction with local organizations to engage in informational and voter registration campaigns aimed at low-income citizens in public waiting areas of unemployment and welfare offices and other such public places to which large numbers of citizens come. The federal courts have consistently recognized the First Amendment right of Project VOTE to engage in such activity. Project VOTE has requested leave to file an *amicus* brief in this case in order to vindicate in this Court the important First Amendment principle that government cannot forbid all First Amendment activity in these and other public places which are important forums for citizens to communicate with each other across the country.

People for the American Way ("People For") is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights. People For has requested leave to file an *amicus* brief in this case in order to help vindicate the important First Amendment principles at stake, particularly the principle that government cannot prohibit free distribution of literature and other First Amendment activity in government controlled and owned public places such as airport terminals and the public waiting rooms of government buildings where people congregate.

Families USA is a national, non-partisan advocacy organization which focuses its efforts on seeking fundamental

improvements to ensure access to affordable, high-quality health care and long term care for families across America. Among its other activities, Families USA speaks out on health care and related issues and has established a grass roots, legislative-alert network of senior citizens and others interested in such issues. Families USA has sought leave to participate as an *amicus* in this case because of its interest in helping to ensure broad participation by citizens in communicating and decision-making on vital civic issues and in preventing government action which improperly closes off entire public forums as places for citizens to receive information on such issues.

SUMMARY OF ARGUMENT

Under the public forum doctrine, as set forth by this Court, the public concourses of airport terminals should be categorized as traditional public forums. The opinion of the Second Circuit below erroneously interprets public forum doctrine concluding, contrary to established precedent in five Circuits, that public airport terminals are non-public forums. The Second Circuit opinion should be reversed in this respect.

Traditional public forums are not strictly limited to the quintessential, and increasingly anachronistic, examples of streets, sidewalks, and parks. This Court has carefully delineated the objective characteristics of those properties that embody the concept of a traditional public forum. These characteristics are found today in modern public thoroughfares such as public airport and bus terminals and train stations. The argument that public forum doctrine can be limited, however, by such means as allowing the government's own decisions concerning the purpose of property to determine public forum status or limiting traditional public forums strictly to historical concepts of streets, sidewalks and parks would emasculate the doctrine. Under such a view, the government would have unlimited discretion to determine when and if a regulation restricting protected speech is reviewed under a strict scrutiny or a reasonableness standard. Vesting such broad discretion in the government runs contrary to decades of precedent. *Amici* urge this Court to reverse the Second Circuit's opinion regarding the non-public character of public airport terminals and find that these terminals are traditional public forums in which the Port Authority's

free speech restrictions are subject to strict judicial scrutiny, and are therefore unconstitutional.

Even if the Court finds that the airport terminals are not "quintessential" public forums, the Court should uphold the Second Circuit's determination that the Port Authority may not constitutionally enforce a blanket ban on the distribution of literature there. Leafletting is fundamental to First Amendment expression, and restrictions on that type of activity are evaluated with special care. Moreover, the Port Authority's regulation imposes a categorical ban on this activity in places which, even if they are not viewed as traditional public forums, possess many of the objective characteristics of public forums and are among the few remaining sites uniquely suited for public expression in a society becoming increasingly insular.

In light of the important First Amendment concerns which are clearly implicated here, the Port Authority could only have justified its intrusion on free speech by showing, at a minimum, that the prohibited activity is incompatible with the normal activity of the airport terminals. This, however, it failed to do. Leafletting, one of the least disruptive forms of First Amendment expression, is plainly compatible with the nature of airport terminals -- public places to which millions of people are freely admitted who engage in significant social and commercial intercourse. Because leafletting is, on its face, compatible with the nature of airport terminals, the Port Authority's sweeping ban on distribution is not reasonable. The Port Authority has made no effort to tailor its regulation to certain times, quantities or sites within the terminals so that its asserted traffic-flow needs could be harmonized with First Amendment activity.

Although this particular case involves religious speech in airport terminals, the Court's holding will have implications for other core First Amendment activities as well. For example, the efforts of voter registration organizations like *amicus* Project VOTE, which inform citizens of their right to vote and enable them to exercise that right, could be endangered by this Court's decision. Numerous lower court decisions upholding the First Amendment right of such organizations to engage in this kind of fundamental

political speech on public property could be undermined by this Court's decision.

For these reasons, the judgment of the Court of Appeals that the Port Authority's leafletting regulation is unconstitutional should be upheld.

ARGUMENT

I. THE PUBLIC CONCOURSES OF THE NEW YORK PORT AUTHORITY'S AIRPORTS ARE PUBLIC FORUMS

This Court's assessment of free speech protections afforded under the First Amendment has evolved from an 1897 opinion upholding a ban on any public address upon publicly owned property without a permit,[1/] to an analysis based on the compatibility of the speech activity with the normal relevant activity of the forum,[2/] to the currently favored public forum doctrine.[3/] As the process of refining the public forum doctrine continues, it is imperative that the fundamental framework of the doctrine retain its integrity by maintaining a viable category of traditional public forums not limited exclusively to streets, sidewalks and parks.

The fundamental framework of the public forum doctrine set forth by this Court, properly applied, inevitably leads to the conclusion, as five Circuit Courts of Appeal have recognized, that municipal airports are quintessential public forums. As explained *infra*, any other reading of the public forum doctrine, such as the interpretation by the Second Circuit in its opinion below, would emasculate it and sharply curtail fundamental free speech protections.

1/ *Davis v. Massachusetts*, 167 U.S. 43 (1897).

2/ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

3/ *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

A. The Second Circuit Erred In Finding That The Expressed Purpose Of A Property Is Determinative Of Its Status As A Public Or Non-Public Forum

Under public forum doctrine as articulated by this Court, the character of the public property at issue determines the standard by which limitations on the First Amendment right of free speech on that property must be evaluated. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). For these purposes, property is divided into three categories: traditional public forums, designated public forums, and non-public forums.

In traditional public forums and government-designated public forums, attempted government regulation of speech activities is subject to strict scrutiny. In non-public forums, however, government regulations need only be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n*, 460 U.S., at 46. The first, and most critical, level of analysis under public forum doctrine, then, is a determination of the category of forum at issue. It is this analysis that the Second Circuit misconstrued in its opinion below.[4/]

4/ The present form of the public forum doctrine has come under attack from scholars and Justices alike. *See* Justice Brennan's dissent in *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115, 3127 (1990); Laurence H. Tribe, American Constitutional Law 993 (2d ed. 1988); Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1716 n.7 (1987) ("In a world of disputatious academic criticism, the unrelenting and unanimous condemnation of contemporary public forum doctrine is truly remarkable."); Richard B. Saphire, Reconsidering the Public Forum Doctrine, 59 Cinn. L. Rev. 739, 741-743 (1991) ("[T]he public forum doctrine has attracted few supporters in the scholarly community."). Because the analytical process used to determine the status of the public property at issue is ultimately the deciding factor in many First Amendment cases, debates over the correct analytical process to be applied lie at the heart of current criticism of the public forum doctrine. Particularly in the wake of this Court's plurality opinion in *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115 (1990), the analytical process is being misconstrued and misapplied by some lower courts, including the Second Circuit in the decision below. It is the misinterpretation of

(continued...)

The Second Circuit's opinion erroneously interpreted this Court's plurality opinion in *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115 (1990), to limit traditional public forums to property which the government has expressly declared to be available for multiple purposes or for protected expression. *International Soc'y for Krishna Consciousness v. Lee*, 925 F.2d 576, 581-82 (2d Cir. 1991). This is a misreading of *Kokinda*. The plurality opinion in *Kokinda* examined the objective characteristics, including use, of the property at issue, concluding that in that particular instance, the post office sidewalk at issue was not used in a manner that exemplified a traditional public forum. The purpose of the property, and the government's interest in facilitating that purpose, was determinative of the reasonableness of the regulation at issue, not the category into which the property was initially placed. Moreover, Justice Kennedy's concurrence read the characteristics of the property differently, implying that the property's use indicated it was a public forum.

As discussed below, the Second Circuit's analysis emasculates the public forum doctrine by: (1) effectively restricting the category of traditional public forums to historical concepts of sidewalks, streets and parks; and (2) placing unlimited subjective discretion in the government to determine the public nature of the property. This dangerous misconstruction of the public forum doctrine should be reversed.

B. The Objective Characteristics Of Property, Including Actual Use Patterns, Rather Than A Subjective Statement Of Intended Purpose, Must Determine Whether The Property Is A Traditional Public Forum

The Court's early public forum decisions placed little emphasis on factors to be considered, or on the analytical approach to be applied, when categorizing public property. The Court relied almost exclusively on the historical traditions of public expression, concluding that streets, parks and sidewalks are quintessential public

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4/ (...continued)
Kokinda that has resulted in the Second Circuit's departure from the consensus among the courts of appeal that an airport terminal is a traditional public forum.

forums. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-516 (1939); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988). As the oft-quoted language of *Hague* states:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

307 U.S., at 515. Thus, places historically associated with free exercise of expressive activities are considered, without more, to be public forums. *United States v. Grace*, 461 U.S. 171, 177 (1983).5/

While this approach correctly recognizes that core public places must be held open for community expression, it fails to accommodate explicitly the development of new, nonhistorical, "quintessential" public forums, such as the airport terminals at issue in the present case. This Court's more recent public forum decisions seek to resolve this difficulty by emphasizing factors beyond the property's historical character. A property's location, purpose, special attributes and customary use also are appropriately considered to determine whether it is a traditional public forum. *See United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115 (1990); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 650 (1981). The Court now has made explicit what was implicit in earlier public forum analysis: public property is not a public forum simply because it is called a "street" or a "sidewalk," but because it has the characteristics commonly

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5/ As recently as 1988, the Court stated that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

associated with such traditional public places. *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct., at 3120 (plurality opinion) ("[t]he mere physical characteristics of the property cannot dictate forum analysis."). This approach allows the flexibility to respond to the evolution of the loci of public discourse.

It is crucial in determining the public forums of modern society to maintain an emphasis on the "objective characteristics of Government property and its customary use by the public." *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct., at 3125 (Kennedy, J., concurring). Determining when public property is a public forum must be based upon an objective assessment of its character, such as whether it is utilized as a public thoroughfare, and whether it is a place of open public access. The lower court, and apparently the federal government, have mistakenly interpreted the plurality opinion in *Kokinda* to approve the use of subjective factors, such as the government's expressed purpose of the property, in public forum analysis. This erroneous interpretation elevates form (defined by the government) over function (the property's actual use characteristics) and grants the government virtually unlimited discretion to determine for itself what is a public forum.

Resting such unbounded discretion over First Amendment rights in government hands has been disapproved consistently by the courts. "The Supreme Court has consistently invalidated such practices, in recognition of the immeasurable injury inflicted on first amendment freedoms by the potentially arbitrary and discriminatory exercise of an official's unfettered discretion." *Jamison v. City of St. Louis*, 828 F.2d 1280, 1284 (8th Cir. 1987) (striking down an airport regulation that gave the airport director "complete and unguided discretion to rule on applications to exercise first amendment rights"), *cert. denied*, 485 U.S. 987 (1988); *Hague v. Committee for Industrial Organization*, 307 U.S., at 516 (holding unconstitutional a Jersey City ordinance that enabled the Director of Safety to refuse a permit "on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.'").

However, in *Henderson v. Lujan*, 768 F. Supp. 1 (D.D.C.), *appeal docketed*, No. 91-5258 (D.C. Cir. Aug. 16, 1991), the federal government has overtly attempted to dictate the status of even a traditional public forum, a sidewalk. Relying on the

plurality in *Kokinda*, the government argued that its own subjective characterization of the sidewalk on Constitution Avenue opposite the Vietnam Veterans Memorial as part of the Memorial justified a prohibition on distribution of literature on this sidewalk. The district court properly rejected the government's arguments, noting that "the government cannot 'transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.'" *Henderson*, *supra*, at 2 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

Under the Second Circuit's interpretation of *Kokinda*, if public streets were, like airport terminals, a recent innovation, they would not be a traditional public forum because their "overriding purpose" is to facilitate land transportation, not public debate and discourse. Public streets have never been devoted to assembly and debate "by government fiat"[6/], nor was assembly and debate ever the specific purpose of the streets. It is the actual use made of the streets, rather than the government's purported purpose for them, that has transformed streets into "quintessential" public forums. Similarly, it is the actual use made of airport terminals that establishes them as public forums and warrants reversal of the Second Circuit's decision below.

At least one court has taken to its logical extreme the Second Circuit's deference to the expressed purpose of a property, and explicitly interpreted the public forum doctrine to limit the category of traditional public forums solely to historical places. *See International Caucus of Labor Comms. v. Dade County*, 724 F. Supp. 917, 921 (S.D. Fla. 1989), where the court found a public airport to be a non-public forum because it was neither a historical public forum, *i.e.*, one created by "sheer weight of tradition," nor was it expressly designated as a public forum by the government. Such a position effectively vests total control over the determination of public forums in the government, contrary to established Court precedent. *Amici* urge the Court to clarify that traditional public forums are not restricted to outdated concepts of Main Street, USA, nor is the expressed government purpose or other subjective

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6/ *Perry Education Ass'n*, 460 U.S., at 45.

characteristics of public property determinative of whether that place is a *traditional* public forum.[7/]

C. Public Airport Terminals Are Public Forums Because They Meet The Necessary Objective Criteria

Public airports are not, of course, places for public discourse since "ancient time" nor have they been held in trust for public use "immemorially." Nonetheless, it must be recognized that as modern society evolves, so too will its natural meeting places. Where public parks were once considered a safe, central place for citizens to gather at their leisure, today's parks may often be locations to be avoided. Where once only paths, and then town lanes existed as public thoroughfares, now public airport terminals, train stations and bus stations are an integral part of the modern public thoroughfare. Like streets and sidewalks, terminals are open to all citizens, facilitate commerce and transportation, and are the focus of numerous commercial activities. Terminals are typically busy, noisy places where an audience can be found and speech activities are not out of place.

Significantly, every Court of Appeals that has heretofore considered the character of the hubs of modern transportation has held that they possess the objective characteristics of historical public forums. *See, e.g., United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983) ("Whatever common sense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family"); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) ("the spacious, city-owned common areas [of Chicago's O'Hare Airport] . . . resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally

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7/ Such factors may, however, properly affect the determination of whether a particular regulation is an appropriate time, place and manner restriction, or a reasonable restriction.

protected rights to communicate ideas and information"); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) ("The parallel between public streets and the . . . central concourses of the . . . terminal buildings, where air travelers as well as the general public may shop, dine, imbibe, and sightsee, is clear and powerful . . . ."); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973) (Oakland Airport); *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987) (City of St. Louis Airport), *cert. denied*, 485 U.S. 987 (1988); *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (Port Authority Bus Terminal: "In other times . . . travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal . . . becomes something of a small city -- but built indoors, with its 'streets' in effect set atop one another . . . . Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place . . . .").

The Port Authority argued below that the New York airport terminals are not traditional public forums because their sole purpose is to facilitate air travel, not public discourse, and the exclusion of basic First Amendment activities is necessary to fulfill that purpose. This narrow view is the illogical equivalent to arguing that the sole purpose of a public park is to facilitate recreation, or that the sole purpose of a public street is to facilitate land travel. While the facilitation of air travel may be an essential purpose of airports, it clearly is not the *only* purpose. Business meetings are conducted at airport facilities, family members visit with relatives who have layovers between flights, businesses hawk wares ranging from food to postage stamps, people buy and read newspapers, magazines and books, and even discuss their contents with others in airport lounges.

Significantly, the federal government's regulations acknowledge the objective public forum character of airport terminals. According to the Federal Aviation Administration (FAA):

> in many respects, *the terminals are like any other public thoroughfare where there is no*

> *question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply*. These activities enjoy the protection of the First Amendment, and they may not be regulated by airport authorities in the same manner as commercial activity.

45 Fed. Reg. 35,314 (1980) (emphasis added) (regarding Dulles and National airports in Washington, D.C.). FAA regulations specifically permit a broad range of First Amendment activities in these airports, including distribution of written and printed materials and solicitation of funds, subject to certain time, place and manner restrictions. 14 C.F.R. § 159.93 (1991). Similarly, St. Louis Airport Authority Rule 1.05 states that persons or organizations desiring to exercise constitutional freedoms "shall be protected in such activities, provided that the same do not constitute commercial activities and do not result in interference with transportation functions of the Airport." Airport Authority Rule 1.05, quoted in *Jamison v. City of St. Louis*, 828 F.2d, at 1282. *See also* City of Oakland ordinance 1.151, quoted in *Kuszynski v. City of Oakland*, 479 F.2d, at 1130-31 ("The use of the Airport for the purpose of exercising the right of free expression and communication, including but not limited to the distribution of non-commercial, non-obscene, non-subversive literature . . . shall not be allowed to impair or interfere with the transportation function of the Airport. The exercise of such rights shall be in accordance with the following rules and regulations . . . .").[8/]

As Justice Kennedy noted in *Kokinda*, "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, ___ U.S. ___, 110 S. Ct., at 3125

8/ There are also examples of government regulations, including the regulations at issue in this case, that expressly prohibit virtually all First Amendment activities in public airport terminals. This fact reinforces the argument that government regulations are not determinative of public forum analysis. If regulations were determinative, an airport facility in one city might be determined to be a public forum while a virtually identical airport facility in a similar city would be a non-public forum.

(Kennedy, J., concurring). Citizens may no longer pay neighborly visits in the park or stroll down main street. They do, however, congregate in public waiting rooms of public buildings. They emerge from their cars and circulate in public airport and bus terminals. If these places are not modern society's traditional public forums, then such places effectively no longer exist. To ensure that the public forum doctrine and its two-tiered standard for assessing the constitutionality of restrictions on free speech retains its integrity and vitality, *amici* urge this Court to reverse the Second Circuit's erroneous interpretation of the public forum doctrine and find that public airport terminals are a traditional public forum subject to strict judicial scrutiny.

D. Under the Public Forum Standard, The Port Authority's Broad Ban On The Distribution of All Written Material Violates The First Amendment

Because public airport terminals are public forums, the Port Authority's regulations on public airport terminals are analyzed under strict scrutiny. *Perry Education Ass'n*, 460 U.S., at 45. A time, place, and manner regulation in a public forum must be "content-neutral . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

The Port Authority's regulation prohibits, in part, the "continuous or repetitive . . . distribution of flyers, brochures, pamphlets, books or any other printed or written material" to passers-by in the terminals of Kennedy, La Guardia and Newark airports. *International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 578-79 (2d Cir. 1991) (citing the regulation in question).[9/] Under a strict scrutiny analysis, the Court has consistently struck down such broad bans on leafletting in public forums. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider*

9/ While each of the regulations in question in this case are arguably unconstitutional under either a strict or lesser level of scrutiny, these *amici* will focus their discussion on the constitutionality of the Port Authority's leafletting regulation since, as described *infra*, the Court's treatment of this part of the Port Authority's regulation is most directly relevant to *amici's* interests.

v. New Jersey, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943); *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The Port Authority's complete prohibition on leafletting does not serve a significant government interest. As discussed *infra*, leafletting is one of the least intrusive forms of First Amendment activity, and is not incompatible with the nature of airport terminals, which are open public spaces characterized by a significant amount of social and commercial intercourse. Any incidental annoyance caused by petitioner's activity is justified by "the constitutional protection of the freedom of speech and press." *Schneider*, 308 U.S., at 162; *Martin*, 319 U.S., at 146-47.

In addition, the Port Authority's regulation is not narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S., at 485 (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). The Port Authority has made no showing that each instance of handing out a leaflet interferes with the purposes of the airport terminals. *See Taxpayers for Vincent*, 466 U.S., at 808-10 (finding constitutional a ban on posting of signs because each instance of posting inherently interfered with the government's interest). Nor has the Port Authority tailored its regulation, so as not to burden more speech than necessary, by limiting its restrictions to certain times, quantities and/or sites within the terminals. *See Heffron*, 452 U.S., at 648-54 (upholding a restriction on leafletting on public fairgrounds because the restriction was less than a total ban, and only limited distribution of literature to fixed locations).

Finally, the regulation does not leave open ample alternative means of communication. Where, as here, the government seeks to totally ban distribution of literature in a public forum, the Court has for some time rejected the view that such an action is constitutional because other forums are available for that activity. An individual "is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S., at 163; *Wolin*, 392 F.2d at 91-92. The Port Authority's complete ban on

the distribution of literature thus cannot survive First Amendment scrutiny.

II. THE PORT AUTHORITY'S SWEEPING BAN ON DISTRIBUTION OF LITERATURE IS UNCONSTITUTIONAL EVEN IF THE AIRPORTS ARE NOT FOUND TO BE QUINTESSENTIAL PUBLIC FORUMS.

Amici urge the Court in Section I to reverse the Second Circuit's determination that the airports are not public forums, and consequently find that under strict scrutiny the Port Authority's broad ban on the distribution of literature violates the First Amendment. However, even if the Court finds that the Port Authority's leafletting prohibition does not operate in traditional public forums, *amici* urge the Court to uphold the Second Circuit's determination that the First Amendment requires the Port Authority to provide reasonable access to the terminals for the distribution of literature, and that the regulation, in completely closing off such access, is unconstitutional.

A. The Distribution of Literature in Public Places Has Always Been Regarded As Essential First Amendment Expression, And The Court Has Carefully Scrutinized Broad Bans On This Important Channel of Communication

An analysis of the Port Authority's ban on leafletting, which categorically prohibits the distribution of literature in public places, must begin with the recognition that the regulation "operates at the core of the First Amendment." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (describing anti-picketing ordinance). As described below, the Court has long held that protecting the ability to disseminate written information in public is fundamental to ensuring the open exchange of ideas and information contemplated by the Constitution.

It is beyond dispute that the written dissemination of views, information, and opinions in the form of leafletting is protected by

the First Amendment.[10/] *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S., at 647. Early in the development of First Amendment jurisprudence, the Court emphasized that distributed pamphlets were "historical weapons in the defense of liberty," which "have proved most effective instruments in the dissemination of opinion," *Schneider*, 308 U.S., at 162, 164, and concluded that protecting the right to distribute information is "vital to the preservation of a free society." *Martin v. City of Struthers*, 319 U.S., at 146-47.

Even more recently, the Court made it clear that "peaceful pamphleteering 'is not fundamentally different from the function of a newspaper.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) (quoting *Organization for a Better Austin v. Keefe*, 402 U.S., at 419). While both mediums provide essential means for communicating information and ideas, leafletting may in fact serve First Amendment interests which a newspaper cannot, because it provides a more accessible forum to those with diverse views or those who may not have the financial means to communicate through more elaborate channels. *See Martin*, 319 U.S., at 146.

For these reasons, leafletting traditionally has been viewed as fundamental to free expression, and the Court has accordingly evaluated the constitutionality of restrictions upon that kind of expression with special care. L. Tribe, *supra* note 4, § 12-24, at 988; *see also Heffron*, 452 U.S., at 649-55 (finding that time, place and manner restriction on leafletting at a state fair must serve a significant government interest, must be the least restrictive means of regulation and must leave open ample alternative channels for communication of the information); *Wolin*, 392 F.2d, at 92. With

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10/ Leafletting involves several related First Amendment rights: the right to express ideas, *see, e.g., Street v. New York*, 394 U.S. 576, 593 (1969); *Martin v. City of Struthers*, 319 U.S., at 143, the right to be exposed to ideas expressed by others, *see, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin*, 319 U.S., at 143, and the right to associate with others in the expression of opinion, *see, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Healy v. James*, 408 U.S. 169, 181 (1972).

these principles in mind, the Port Authority's ban on leafletting, as discussed below, is unconstitutional even if the terminals are not considered public forums.

B. Even if the Court Finds That the Airports In Question Are Not Public Forums, The Port Authority's Broad Ban On the Distribution of All Written Material Is Not a Reasonable Restriction

Even if the Court finds that the airports are not "quintessential" public forums, *amici* urge the Court to uphold the Second Circuit's determination that the Port Authority's ban on the distribution of literature is unconstitutional. In reaching its conclusion, the Second Circuit stressed the *Kokinda* plurality's finding that leafletting had a relatively small disruptive effect on government business, and emphasized Justice Kennedy's important concern with the need "'to protect public places where traditional modes of speech and forms of expression can take place." *International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 582 (2d Cir. 1991) (quoting *Kokinda*, ___ U.S. ___, 110 S. Ct., at 3125 (Kennedy, J., concurring)). The Second Circuit's analysis is correct: it is plainly unconstitutional for the government to completely prohibit, in places uniquely suited for public discourse, an entire channel of expression which traditionally has been viewed as core First Amendment activity, and which is entirely compatible with the normal activity of those places.

At a minimum, any regulation of speech must be "reasonable and not an effort to suppress speech merely because public officials oppose the speaker's view." *Perry Education Ass'n*, 460 U.S., at 46. However, the Court has not, and should not, merely rubber-stamp time, place and manner restrictions on speech whenever it determines that a "quintessential" public forum is not involved. Such an approach endangers core First Amendment values by artificially emphasizing the significance of the public forum determination over other equally important concerns which are central to the Court's First Amendment analysis.

Aside from applying public forum analysis to a public place, the Court has also looked closely at the nature and scope of the

restriction at issue and its relation to (1) the asserted government interest, and (2) the *particular* characteristics of the regulated place. For instance, categorical bans on a particular medium of expression generally pose significant threats to First Amendment values, and call for careful scrutiny. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 526-27 (1981) (Brennan, J., concurring); *Schneider*, 308 U.S., at 160-62 (striking down complete bans on handbilling because less restrictive alternatives were available).[11/] In addition, "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S., at 650-51. Thus, determining the reasonableness of restrictions on speech in public places must also include an evaluation of these factors.[12/]

This applies equally to the regulation of speech in public places found to be non-public forums. For example, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court, in considering an ordinance which prohibited the posting of signs on public property, carefully considered all the significant First Amendment implications of the regulation despite the Court's finding that the property covered by the regulation was a non-public forum. The Court focused on the fact that the ordinance broadly curtailed a manner of communication, and proceeded to analyze the significance of the asserted government interest, whether the

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11/ *See also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (striking down zoning ordinance which totally banned live commercial entertainment because the government could not sufficiently justify its interests and because those interests could be satisfied with less intrusive means); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (striking down a state ban on advertising of prescription drug prices, and finding that such a complete prohibition on advertising could not be characterized as a mere time, place, or manner restriction).

12/ *See Schad*, 452 U.S., at 75-76, ("[t]o be *reasonable*, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication.") (emphasis added).

ordinance was narrowly tailored[13/] and whether it left open alternative channels of communication. In addressing the public forum issue, the Court stated that the non-public forum label was of "limited utility" in the case before it, and especially in cases "falling between the paradigms of government property interests." *Id.*, at 815 n.32.[14/] *See also Heffron*, 452 U.S., at 650-56 (distinguishing fairgrounds from the quintessential public forum of city streets, but then focusing on the significance of the government interest, the availability of alternative forums, the nature and scope of the regulation, and whether the regulation was narrowly tailored).

This case similarly implicates important First Amendment principles beyond the more formalistic distinction of whether the airports at issue are quintessential public forums.[15/] Even if the airport terminals are found not to be "quintessential" public forums, the airport terminals still possess objective characteristics very similar to streets, sidewalks and parks, and thus provide a unique opportunity for the dissemination and communication of

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13/ *See Frisby v. Schultz*, 487 U.S., 485-86, where the Court interpreted part of its ruling in *Taxpayers for Vincent*:

> A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation . . . rendered each sign an evil.

14/ While the Court in *Taxpayers for Vincent* upheld the regulation at issue, it explicitly distinguished its holding from that of *Schneider*, where the Court struck down a ban on leafletting. 466 U.S., at 809-10.

15/ As the *Vincent* Court suggested, "'the analytical line between a regulation of the "time, place, and manner" in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a "public forum" may blur at the edges.'" *Taxpayers for Vincent*, 466 U.S., at 815 n.32 (quoting *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 132 (1981)).

information, especially by those of limited financial means.[16/] *See* Section I, *supra*. For these reasons, they are clearly "more than a non-public forum," and demand higher scrutiny than "those instances where the Government created a nontraditional forum to accommodate speech for a special purpose," as with teachers' mailboxes in *Perry*, or the Combined Federal Campaign in *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985). *See Kokinda*, ___*U.S.*___, 110 S. Ct., at 3125 (Kennedy, J., concurring). In addition, within these unique public places the Port Authority here seeks a *complete ban* on an activity which, as discussed *supra*, has traditionally been recognized as central to First Amendment expression. Given the gravity of the various First Amendment considerations at stake here, the Court would seriously undermine First Amendment protection on a broad scale if it allows the Port Authority to ban the distribution of literature based predominately on a finding that airports are not traditional public forums.

Rather, when a complete ban on a particular channel of communication in public places is at issue, as it is here, the heightened threat to First Amendment freedoms warrants a closer examination of whether the activity at issue actually interferes with the normal activity of a public place:

> The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to speech justifies this silence. To put it another way, the question is whether '*the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.*'

City of Lakewood, 486 U.S., 763 (emphasis added) (describing time, place, and manner test which would apply to a complete ban on a particular manner of expression on public property) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)); *see also*

16/ As society becomes more "insular in character," places like the airport terminals become even more valuable and unique as "public places where traditional modes of speech and forms of expression can take place." *See Kokinda*, ___U.S.___, 110 S. Ct., at 3125 (Kennedy, J., concurring).

Grayned, 408 U.S., at 116 ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.'") (citation omitted).[17/]

Several circuit courts of appeal have reached the same conclusion, finding that a broad restriction on speech even in a non-public forum is "reasonable" only if the expressive activity is incompatible with the normal activity of the place being regulated. For example, in *Gannett Satellite Information Network v. Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984), the court found that public property which is neither a traditional nor a designated public forum can still serve as a forum for First Amendment expression if the expression is appropriate for the property and is not "'incompatible with the normal activity of a particular place at a particular time.'" *Id.*, at 773 (quoting *Grayned*, 408 U.S., at 116). The court held that the presence of newsracks is not incompatible with the operation of train stations. *See also Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (finding that a state railway bed was neither a traditional or limited public forum, but holding that the state could not broadly prohibit demonstrations there without showing that the activity interfered or was incompatible with the place); *Stewart v. District of Columbia Armory Board*, 863 F.2d 1013, 1019-20 (D.C. Cir. 1988) ("compatibility is relevant to the ultimate determination of whether restrictions on speech are either reasonable or narrowly tailored to a compelling state interest").

Under these standards, the Port Authority's complete ban on distribution of literature in the airport terminals is not "reasonable."[18/] Given the broad nature of this restriction, the

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17/ In *Grayned*, the Court upheld a narrowly tailored anti-picketing ordinance because it "punishes only conduct which disrupts or is about to disrupt normal school activities." *Grayned*, 408 U.S., at 119. In contrast, the leafletting regulation at issue here is an "impermissibly broad prophylactic ordinance." *Id.*

18/ The fact that the regulation only bans "repetitive" distribution is not relevant to First Amendment analysis. It can hardly be said that the Port Authority's prohibition is any less intrusive on speech because it allows a person to travel to the airport, hand out one leaflet, and leave. By definition, leafletting involves repetitive activity, as its purpose is almost always to reach a number of people.

fundamental expressive activity which it seeks to restrict, and the highly public nature of the regulated place, the Port Authority has not sufficiently shown that peaceful pamphleteering is incompatible or interferes with the activity which normally occurs in airport terminals.[19/]

The airport terminals are public spaces where people generally wait for a flight, mill about, shop or just pass through. Circuit courts of appeal have noted that this scene resembles a city street. "Both are lined by shops, restaurants, newsstands and other businesses, with travelers or other members of the general public coming and going as they please." *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). Millions of people are freely admitted to and pass through these terminals each year, engaging in a "'considerable amount of social and commercial interchange.'" *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 765 (D.C. Cir. 1983) (quoting FAA at 45 Fed. Reg. 35,314 (1980)). Because airport terminals possess these characteristics, they closely "resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information." *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) (citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939)).

Against this backdrop, leafletting is plainly compatible with the nature of airport terminals. *See, e.g. Chicago Area Military Project*, 508 F.2d, at 925 (peaceful leafletting did not interfere with activity of Chicago's O'Hare Airport), *Wolin v. Port of New York Authority*, 392 F.2d 83, 89-90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (ban on leafletting in bus terminal invalidated because the terminal, attended with "noisy crowds" and "less than perfect order," is an appropriate place to express one's views). Amongst a free flow of people engaging in social and commercial interchange

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19/ In its opinion below, the Second Circuit found the record sufficient to demonstrate that in-person solicitation is likely to cause disruption in the airport terminals. However, neither that court nor the district court made any such finding with respect to leafletting.

in an open public space, the act of handing out pamphlets to passersby is hardly disruptive.[20/] Indeed, the Court has recognized that leafletting is one of the least disruptive forms of expression and communication:

> One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time . . . .'

Kokinda, ___U.S.___, 110 S. Ct., at 3123 (quoting *Heffron*, 452 U.S., at 665 (Blackmun, J., concurring)). In addition, a person offered a leaflet is free to decline it. It would be especially easy for an airline passenger whose hands are occupied with baggage to decline a leaflet without even breaking stride. Thus, it is extremely unlikely that leafletting would interfere with the normal activity of airport terminals or with the facilitation of air travel.[21/]

Aside from the fact that leafletting poses little *potential* interference with airport activities, neither of the courts below

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20/ Petitioners seek access only to the wide open spaces within the terminals where people are moving about. As the district court found, they do not seek to leaflet "in any private offices, ticket counters and lines, check-in areas, baggage claim areas, or exclusively-leased waiting areas – in short, those areas where concerns over security, congestion and captive audiences may be particularly acute." *International Soc'y for Krishna Consciousness v. Lee*, 721 F. Supp. 572, 578 n.9 (S.D.N.Y. 1989).

21/ Moreover, such activity is no more intrusive than if petitioners attempted to communicate their views verbally. *See United States v. Fennelly*, 726 F. Supp. 871, 874 (D.D.C. 1989) (recognizing that there is no principled distinction in government interest between banning leafletting and banning communication by word of mouth). Thus, if the Port Authority can constitutionally prohibit leafletting in the airport terminals, it might be free to ban oral communication as well – a result inconsistent with *Board of Airport Comm'rs of Los Angeles v. Jews For Jesus*, 482 U.S. 569 (1987) (finding unconstitutional a regulation prohibiting all First Amendment activities in the Los Angeles International Airport terminal).

found that the Port Authority presented any hard evidence of actual interference with airport activities or purposes with respect to leafletting, as opposed to solicitation. *See Lee*, 925 F.2d, at 582; *cf. Schad*, 452 U.S., at 75 (no evidence had been presented to establish that regulated activities interfered with the uses of the place). And, unlike the situation in *Vincent*, where the Court found that visual blight inherently accompanied the posting of every sign, there has been no showing that *every* act of distributing a leaflet in the airports, regardless of the specific time, place within the terminals, and manner of such activity, would inherently cause disruption. *See Taxpayers for Vincent*, 466 U.S., at 809-10 (distinguishing the posting of signs from the leafletting at issue in *Schneider*). Nor has the Port Authority attempted to find a less-intrusive alternative which could serve its asserted goals, as in *Heffron*, where the Court upheld a restriction on leafletting on public fairgrounds because the restriction was less than a total ban, and only *limited* distribution to fixed locations. *See Fernandes v. Limmer*, 663 F.2d 619, 633-635 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (blanket prohibition on solicitation and distribution inside airport terminals overbroad).

In light of these facts, a ruling by this Court that the act of distributing literature interferes with the activity of the airports, and thus that the prohibition is constitutional, could open the door to substantial erosion of First Amendment protection for activities which have historically been found to lie at the core of First Amendment expression. Since the restriction on speech being scrutinized here is a broad time, place and manner regulation which applies to all types of speech, the Court's ruling will have implications beyond the instant activity of distributing religious materials; also at stake is First Amendment protection for societal and political speech.[22/] For example, the efforts of organizations

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22/ Justice Harlan has commented eloquently on the dangers of overreacting to what one might consider the fringes of protected speech:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the (continued...)

like *amicus* Project VOTE, which is engaged in fundamental political speech in its efforts to encourage and enable citizens to exercise their right to vote, could clearly be affected by this Court's decision.

The right to vote is the most fundamental right in our system of government and exercise of that right is critical to the preservation of the system and of all other rights and freedoms enjoyed under it:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Thus, speech which centers on a citizen's right to have a direct say in who will govern, and how, is fundamental to the First Amendment's essential role in ensuring an open and effective political process. *See New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (in its essence, First Amendment protects free political discussion so that "'government may be responsive to the will of the people'") (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

As described above in its Statement of Interest, Project VOTE is engaged primarily in an effort to inform and increase civic participation and voter registration among millions who have not previously participated in elections, particularly low-income citizens. In order to target this audience, for some ten years Project VOTE has conducted many of its First Amendment activities in the waiting rooms and lobbies of various government agencies, including unemployment, welfare and food-stamp offices, which are

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22/ (...continued)

> process of open debate permits us to achieve. . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance . . ., these fundamental societal values are truly implicated.

Cohen v. California, 403 U.S. 15, 24-25 (1971) (citations omitted).

forums were many people congregate. Nowhere else can large numbers of such citizens be reached nearly as effectively.[23/] Nor is there a more appropriate setting in which to advise them of their rights to vote and to encourage the exercise of those rights.

Government efforts to curtail these and similar activities have been consistently held by lower courts to violate the First Amendment, based primarily on findings that these waiting areas and lobbies are public forums, that bans on such communication efforts are not reasonable, and that such activities do not interfere with the proper functioning of such places.[24/] That First Amendment analysis is clearly at issue in this case. Should the Court narrowly constrict public forum doctrine, find that the airports are non-public forums, and then find that distribution of leaflets is incompatible with airport activity, it could undermine numerous decisions upholding the right of Project VOTE and other similar organizations to access the only practical public places where they can communicate with populations of unregistered voters, inform them of their fundamental right to vote, and help them to exercise that right.

23/ *See, e.g., Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (finding that state welfare offices were the only appropriate places in which plaintiffs could identify and organize welfare recipients); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372 (D.R.I. 1971) (ruling that state unemployment office waiting rooms were the only place in which plaintiffs could identify their target population and that the offices' general nature, essential purpose, and pattern of usual activity made them appropriate forums).

24/ *See, e.g., New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232 (2d Cir. 1982); *Albany Welfare Rights Org. v Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974); *Neighborhood Information Sharing Exchange v. Engler*, No. 4:91-CV-140 (W.D. Mich. 1991); *Project Vote v. O'Hara*, No. 84-4333-CV-C-5 (W.D. Mo. Sept. 27, 1984); *Project Vote v. Freeman*, Civ. No. 84-509-B (S.D. Iowa July 26, 1984); *Project Vote v. Thornburgh*, No. 84-1255 (E.D. Pa. 1984); *Project Vote v. Orr*, No. I P 84-394-C (S.D. Ind. March 25, 1984); *Project Vote v. Ohio Bureau of Employment Services*, No. C-1-82-905 (S.D. Ohio Sept. 13, 1982); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372 (D.R.I. 1971).

CONCLUSION

For the forgoing reasons, the airport terminals are public forums and the judgment of the court of appeals on this point should be reversed. Further, under a public forum analysis, the Port Authority's blanket prohibition on the distribution of literature violates the First Amendment. Even if the airport terminals are not traditional public forums, the judgment of the court of appeals that the leafletting prohibition is unconstitutional since it does not allow reasonable access to the terminals for the distribution of literature should be upheld.

Respectfully submitted,

Robert Plotkin
Counsel of Record for the Amici Curiae
Elinor L. Colbourn
Andrew J. Steinberg
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

Elliot M. Mincberg
Sonia A. Bacchus
People For The American Way
2000 M St., N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

February 14, 1992

91-155
Nos. 91-555 and 91-339

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

International Society for Krishna Consciousness, Inc., and Brian Rumbaugh,

Petitioners,

v.

Walter Lee, Superintendent of Port Authority Police,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE COUNCIL ON RELIGIOUS FREEDOM, THE FIRST LIBERTY INSTITUTE, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD MCGLYNN GAFFNEY, JR.
VALPARAISO UNIVERSITY
SCHOOL OF LAW
656 South Greenwich Street
Valparaiso, IN 46383
219-465-7834
Counsel of Record

STEVEN T. MCFARLAND
BRADLEY P. JACOB
CENTER FOR LAW & RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane
Suite 222
Annandale, VA 22003
703-642-1070

THOMAS C. BERG
1642 E. 56th Street, #1212
Chicago, IL 60637
312-955-1846
Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a governmental agency that permits a wide variety of political and commercial speech in airport facilities may single out charitable solicitation for the distribution of religious literature for special regulation without excessively burdening free exercise of religion and the freedom of speech enjoyed by religious communities and their members.

Whether the Court should reaffirm its teaching that the Free Exercise Clause mandates governmental neutrality, not official hostility, toward religion.

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INTERESTS OF AMICI CURIAE

Amici curiae are national religious and educational organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. Although the *amici* do not espouse or endorse the particular Hindu doctrines or practices of the petitioners, they include among their members many religious adherents who are deeply committed to evangelistic activities. All of the *amici*, irrespective of whether they engage in proselytizing activities themselves, are committed to the proposition that all sincere religious practices are entitled to the equal protection of the laws, and are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the

parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case involves regulation of speech at three of the airport terminals that serve the New York metropolitan area. An interstate agency, the Port Authority [Port] does not generally prohibit the dissemination of information at these airports. One can purchase a variety of newspapers, periodicals, and books at many of the stores in these facilities. In keeping with the memory of Mayor Fiorello La Guardia and President John Fitzgerald Kennedy – after whom two of the airports are named – one may listen to political speeches by candidates for public office in these facilities, and contribute to their campaigns. One can shop at Bloomingdale's in these facilities, and the Port actively promotes commercial speech in its facilities by dedicating conference space for the use of corporate representatives of the Fortune 500 to engage in business ventures. But after acknowledging in a 1985 deposition that the religious activities of the petitioner were not in any way disruptive of the airport facilities, the Port in 1988 issued a regulation that forms the basis of the present challenge. This regulation may seem neutral in a formal sense, but in the view of the *amici* it plainly takes aim at an unpopular religious group, and is invalid for that reason alone.

In short, the manner in which the Port has chosen to regulate speech is not content-neutral. Instead, the Port has singled out the unpopular speech of a vulnerable

religious minority for disparate treatment, subjecting the devotees of the Hare Krishna faith to regulation that it would never dream of imposing upon President Bush or Governor Clinton when they come to New York to campaign for the Presidency, or upon traveling salespersons coming to the hub of commerce from around the globe to negotiate lucrative business deals. The direct effect of the regulation challenged here is to inhibit the practice of *sankirtan*, an ancient Hindu religious practice that is apparently offensive to some of New York's diverse citizenry. The regulation is thus "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990).

Amici wish to make four related points. First, two of the practices engaged in by the petitioners – distribution of religious literature to nonmembers of their community and begging for alms to support their ministry – are ancient, continuous, well-established, sincere religious practices. Indeed, although there are differences of degree about evangelization and proselytizing among various religious communities, virtually all faiths in America maintain some form of outreach to nonmembers. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires more than mere formal governmental neutrality toward religion. It requires that religious communities and their members enjoy at least as much protection in their distribution of religious literature as their secular counterparts enjoy in the same forum, however that forum is defined. Third, the purported governmental interest invoked by the court of appeals is insufficient as a matter of law because it

does not justify the differential treatment meted out to those who distribute religious literature in airports out of obedience to religious command and those who use airports for the communication of their political convictions or of their commercial messages. The sole reason cited by the court of appeals to justify the regulation – the convenience of travelers rushing late to their planes – does not satisfy the heavy presumption against prior restraint of speech required by the First Amendment. Here, the Port permits a variety of forms of political and commercial speech at the airport, but has carved out a special exception to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. Agencies of the federal and state governments as well as the lower courts have in many instances misconstrued this Court's teaching in *Smith*. When, as here, agencies of government turn a blind eye toward invidious discrimination against a vulnerable religious minority, it is time for this Court to clarify that *Smith* does not countenance official hostility toward religion.

ARGUMENT

I. PETITIONERS ENGAGE IN ANCIENT AND SINCERE RELIGIOUS PRACTICES THAT ARE PROTECTED UNDER THE FIRST AMENDMENT

Krishna Consciousness is a monotheistic branch of devotional Hinduism, formally known as Gaudiya

Vaishnavism. The Hindu religious tradition dates to approximately 3,000 B.C. *See* Larry Shinn, "International Society for Krishna Consciousness," 7 *Encyclopedia of Religion* 266-68 (Mircea Eliade ed. 1987). The bona fide character of this ancient religion has been affirmed by every court in this country, state and federal, that has explored the matter. *See, e.g., Heffron v. ISKCON*, 452 U.S. 640, 652 (1981); *ISKCON v. Barber*, 650 F. 2d 430, 443 (2d Cir. 1981); *Jaffe v. Alexis*, 659 F. 2d 1018, 1020 (9th Cir. 1981); *United States v. Silberman*, 464 F. Supp. 866, 872 (M.D. Fla. 1979) (citing cases).

A. PROSELYTIZING, OR ATTEMPTING TO PERSUADE OTHERS ABOUT ONE'S RELIGIOUS CONVICTIONS, IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

One of the religious practices of the devotees of Krishna Consciousness at issue in this case involves the distribution of religious literature, principally *The Bhagavad-Gita*, a sacred scripture of Hinduism that was formulated around 200 A.D., and that has been called the "New Testament of Hinduism." Edmund Soper ed., *The Religions of Mankind* 10 (1951).[1]

[1] The Bhagavad-Gita was a source of inspiration not only for prominent Indians such as Mahatma Gandhi, but also for the American transcendentalists of the nineteenth century such as Ralph Waldo Emerson and Henry David Thoreau. Walt Whitman and other literary giants of American civilization also cherished the Gita. See Joseph Head and Sylvia Cranston eds., *Reincarnation: The Phoenix Fire Mystery* 227 (1977), and Sylvia Cranston and Carey Williams eds., *Reincarnation* (1984).

This religious practice is, of course, by no means confined to Hindus. For example, the Gospel according to Luke describes the life of Jesus as a journey from the cities and villages of Galilee to the city of Jerusalem in order to "preach and bring the good news of the kingdom of God." (Luke 8:1). The same author, who was the travelling companion of the Apostle Paul on his missionary journeys throughout the Roman Empire, reports that the disciples, in obedience to the direct commission of Jesus himself (Luke 9:1-6; Mt. 28:19-20), "continued without letup teaching and declaring the good news about Jesus as the Christ." (Acts 5:42; 1:8; 20:20).

From the very beginning of the European settlement of this continent, religious communities engaged in strenuous activity to bring the message of Christianity to the natives. For example, the Society for the Propagation of the Gospel in New England was formed in 1649 in response to the efforts of John Eliot to translate the Lord's Prayer and the Ten Commandments into the Algonquin tongue and to preach the Gospel to the natives. *See* Edwin Gaustad, *A Religious History of America* 52 (1966); for a fuller description of the missionary and evangelistic activities not only of the English Puritans, but also of the Spanish, French, and Swedes, *see, e.g.*, Sidney Ahlstrom, *A Religious History of the American People* 103 (1972).

Some religious communities, such as the Jehovah's Witnesses and the Church of Jesus Christ, Latter-Day Saints, are well known for their outreach activities, going door-to-door to share their religious convictions and to distribute religious literature. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court held that although contributions are typically sought by the Witnesses to help

defray the cost of the literature they distribute, that fact did not withdraw the Witnesses' activity from the protection of the Free Exercise Clause, any more than paid advertisements forfeit the protection of the Free Speech and the Free Press Clauses by virtue of their commercial character. *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964). *See also Riley v. Nat. Federation of the Blind*, 487 U.S. 781 (1988) (solicitation of charitable contributions is protected under the First Amendment).

Although not all religious communities in America today engage in the same sort of evangelistic activities, it is fair to say that nearly all religious groups are engaged in some form of outreach to others. In any event, irrespective of whether all such groups engage in proselytizing activities themselves, *amici* are committed to the proposition that all sincere religious practices are entitled to the equal protection of the laws.

B. BEGGING FOR ALMS TO SUPPORT RELIGIOUS MINISTRY IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

Another religious practice implicated by the regulation challenged here is known as *sankirtan*, or begging for alms to support the ministry of the religious community, including its distribution of religious literature. This Court has already recognized this practice as a "ritual" within the protection of the First Amendment. *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981).

Once again, Hindus have no monopoly on this religious practice. For example, the duty of care in ancient

Israel for widows, orphans, strangers, and Levites was typically undertaken not by a formal taxation system, but by voluntary offerings collected on behalf of those in need. *See* Johann Gamberoni, "Almsgiving," 1 *Encyclopedia of Biblical Theology* 16-19 (Johannes Bauer ed. 1970) (collecting biblical texts and secondary literature). The early Christian community clearly appropriated this teaching of the Hebrew scriptures, frequently citing Old Testament texts to reflect high esteem for the practice of almsgiving (1 Cor. 11:20-22; 16:15-17; 2 Cor. 8:1-15; 9: 5-15; Luke 16:19-31; Jn. 13:29). Various religious communities throughout the Christian centuries have made the practice of begging on behalf of the poor an essential component of their religious life. *See* L. Boyle, "Mendicant Orders," 9 *New Catholic Encyclopedia* 648-49 (1967).

In today's culture, this form of charitable solicitation may seem strange or foreign to many members of Christian and Jewish faiths who have become upwardly mobile. The very existence of the buildings in which members of mainline religious bodies gather to worship is palpable evidence that, in one sense, their communities are thriving. Indeed, this material "success" may even make some of these religious adherents reluctant to defend a form of charitable solicitation today that seems foreign to their own practices. But this reluctance has more to do with a loss of memory deriving from socio-economic reasons rather than from theological developments within these communities. And in any event, the sensibilities of the majority are no test of religious truth. *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("Freedom of worship . . . may not be submitted to

vote; [it] depends on the outcome of no election"). Members of minority religions have no less right to practice their faith merely because others recoil from it. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990).

In effect, the Port has prohibited a central religious practice of the Hare Krishna devotees, while exempting a wide variety of secular activities from the strictures of its regulation governing the use of the airport terminal. Begging for almsgiving in public places must be viewed from the only perspective permitted under the First Amendment, that of the religious adherents. Under this view *sankirtan* is utterly vital, an indispensable aspect of their ancient Hindu faith. Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to engage in a religious practice extant among Hindus for nearly 5,000 years, and among Jews, Christians, and Muslims virtually since the founding of these faiths. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 U.S. 1, 71 (1947).

II. RELIGIOUS COMMUNITIES AND THEIR MEMBERS ARE ENTITLED TO AT LEAST AS MUCH PROTECTION IN THE DISTRIBUTION OF RELIGIOUS LITERATURE IN AIRPORTS AS IS ACCORDED TO THE COMMERCIAL AND POLITICAL SPEECH THAT REGULARLY OCCURS IN THESE FACILITIES

The restrictions placed on the distribution of religious literature at the New York and Newark airports by

the Port regulation are not religiously neutral. Although the record in this case does not detail specific instances of overt discrimination, there is a very close fit between the activities prohibited by the regulation and those engaged in by ISKCON devotees, either currently or in the past.[2] On its face, the regulation singles out the very activities for which Krishna devotees are well-known.

There is also an implication that the regulation is readily susceptible of uneven application. The language in the regulation focusing on activity that is "continuous and repetitive," Pet. App. 6, gives to the Port vast discretion to determine what to prohibit. For example, a Port officer might easily look the other way when agents known as "cappers" hawk limousine rides to the City or the suburbs, but come down hard on the Hare Krishnas, and defend the differential treatment by stating that one behavior was "continuous and repetitive" while the other was not. This is the vice of structureless discretion that allows official actors to pursue their personal predilections. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983), citing *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).

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[2] The depositions in this case focused understandably on the legal issues that were then presented, viz., the responsibility of the airlines to allow first amendment activities within the leased areas of the airports. In 1985, Morris Sloane, Deputy Director of the Port Authority, testified that the Port Authority was quite satisfied that the activities of ISKCON devotees were not in any way disruptive of the airport facilities. Sloane Deposition (June 10, 1985), at 75. Until 1988, the Port Authority allowed these activities within the areas of the terminal that were not leased by an airline. JA 63. In that year the airlines were dismissed from the case as a part of a settlement agreement. JA 534.

Thus the primary, if not exclusive, application of the Port's regulation is to the petitioners. As one commentator on *Employment Division v. Smith* has noted, "a law is not neutral if its anti-religious applications are such a major part of the total applications that the anti-religious effect cannot be characterized as 'incidental.'" Douglas Laycock, *The Remnants of Free Exercise* 1990 S.Ct. Rev. 1, 52. Professor Laycock offers an example of a facially neutral ban on the sale of unleavened bread; such a regulation would be invalid not only because the only plausible motive for the regulation is hostility to Jews or to Christians who use unleavened bread in the Eucharist, but also because the anti-religious effect of the regulation would not be incidental since there are virtually no secular uses of unleavened bread. *Id.*; *see also* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

One need not hunt for a smoking gun pointing at folks in shaved heads or saffron robes in order to smell the foul odor of discrimination in this case. Whether transparent or subtle, the discrimination here falls heavily against a less well-heeled group that has to get its support by going into the public square rather than by hosting elegant fund-raising banquets at the Waldorf Astoria.

As the petition for certiorari illustrates, a wide range of political and commercial discourse occurs at airports. Pet. 19. In actual practice, the Port places no restrictions on this sort of communication. Anyone knows that one can buy all the news that's fit to print (and lots more printed material of lesser quality that is no less protected for that fact) within the confines of the New York airport

terminals. Perhaps because of this very fact, the court of appeals acknowledged that the portion of the Port regulation banning distribution of literature violates the First Amendment. Relying on its interpretation of this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 110 S.Ct. 3115 (1990), it affirmed the district court in that respect. Pet. App. 14-15.

Also purporting to rely on *Kokinda*, a case that did not involve any religious activity protected by the Free Exercise Clause, the court of appeals sustained the portion of the Port regulation banning the religious practices of the petitioners with respect to charitable solicitation. Pet. App. 11-14. The functional effect of this reading of the regulation is to impose a burden "specifically directed at [petitioners'] religious practice," a result deemed unconstitutional in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990). Indeed, the Port's regulation cannot be distinguished from an example given by this Court in *Smith*:

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. The New York prohibition may be contrasted with the Oregon anti-drug law upheld in *Smith*. The Oregon law applied to everyone, and the Supreme Court held that no

exception was required for the Native American Church. Here, there is no regulation of political and commercial speech at the airport, but a special exception was carved out to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature.

It is no answer to say that there may be some non-religious rituals or ceremonies to which the regulation may apply. It would prove too much if the authority attempted to ban all forms of communication at the airport, including the sales of the *New York Times*, the *Wall Street Journal*, and other periodicals now available in the bookstores at the airports. If the Port had written a regulation that purported to ban all First Amendment activity in the airport terminals, that would constitute the substantial overbreadth condemned in *Bd. of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1988). Indeed, the vice of the Port's regulation is that it is more targeted, having been adopted in apparent response to the specific popular resentment of the petitioners' religious activities at the airports. The net effect is that the Port regulation, even as construed by the court of appeals, imposes a burden on religious practices that is not imposed upon other kinds of speakers.

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990). Indeed, even those scholars who have espoused a narrow

interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority. *See, e.g.*, Walter Berns, *The First Amendment and the Future of American Democracy* (1985), and Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978). Locke wrote: "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses." John Locke, "A Letter Concerning Toleration," in 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952). The regulation here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause, and the view of the founders that religious freedom is "an unalienable right." Declaration of Independence, 1 Stat. 1 (1776).

The regulation presents two constitutional problems. First, it implicitly determines the forms of communication in a public place that are protected and those that are not; it is not content-neutral. Neither is the Port neutral with respect to viewpoints; the Port favors majoritarian religious viewpoints over those of minorities by banning *sankirtan* at its facilities, while maintaining a tri-faith chapel at JFK airport, with Mass available at noon each day, and with other services for Protestant Christians and for Jews. To the Hare Krishna devotees, the practice of *sankirtan* is truly necessary, as necessary to them as the Mass is to a Catholic, or as keeping the Sabbath is to an observant Jew (and probably more necessary – at least to them – than various forms of commercial speech permitted in the airports of New York). In this respect, the

regulation is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. 872, 110 S. Ct. at 1603. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. 872, 110 S. Ct. at 1603. The great City of New York allows the dissemination of all sorts of political and commercial messages on the Eastside, the Westside, and all around the town, but the Port restricts the distribution of religious literature by the Hare Krishna devotees at the City's airports. Having set up a series of traditional and non-traditional public fora, the Port may not refuse to extend these fora to those who wish to use them merely on the ground that the content of their message is religious. *See Bd. of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2378 (1990), (Marshall, J., concurring); and *Widmar v. Vincent*, 454 U.S. 263 (1981).

The second constitutional problem is that the asserted purpose of the regulation – reserving the airport facilities for uses consistent with transportation – admits

of exceptions that inevitably yield discriminatory application. The Port in fact allows various forms of communication at the airport, including political and commercial speech, that are just as unrelated to a strict definition of the use of the terminal exclusively for transportation. The impact of its regulation thus falls squarely and discriminatorily on religious adherents such as the petitioners, who alone are in fact required to refrain from "bothering" travelers with their message. Accordingly, the regulation under challenge is constitutionally flawed by virtue of its grave potential for discriminatory application. Only superficially designed to cope with an issue of commerce and transportation, this regulation has in fact been applied to ban a protected religious practice.

If the Port wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the Port might be forced to reconsider how powerful its interests in this matter are if it had to apply the same rules that it applies to the practices of the petitioners to political speeches or fundraising by Presidential candidates or to the commercial speech and transactions concluded by traveling salespersons of the Fortune 500 meeting in the conference facilities operated by the Port Authority. *See* Laurie McGinley, *Airports Try to Ease the Pain of Waiting with New Ways For Flyers to Spend Money*, Wall St. J. (Aug. 21, 1990) at B1. In any event, the Port may not have two standards for regulation of speech, one allowing socially acceptable forms of speech, and another banning the efforts of an unfamiliar and unpopular minority religion to share its convictions with others. *See McDaniel v. Paty*, 435 U.S. 618, 640 (1978)

(Brennan, J., concurring) ("religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally"); and *see Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

The line drawn by the court of appeals is oblivious to its implicit religious discrimination. For that reason the judgment below ignored the Court's teaching that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Bd. of Education*, 330 U.S. 1, 15 (1947). The very fact that the Port's regulation takes aim so squarely at one religious group makes it difficult to escape the reach of these cases.

The district court reached its decision before this Court's decision in *Smith*; the court of appeals ruled after this Court's decision in *Smith*, but did not comment on that case. *Amici* urge this Court to clarify the implication in *Smith* that religious discrimination should not be countenanced where low-level interests such as that asserted here by the Port – the convenience of travelers – are the only justifications offered to defeat a First Amendment claim.

One of the reasons why this Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not

"water[ed] down" but rather "really means what it says." 494 U.S. 872, 110 S. Ct. at 1605. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.*

In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest. *Amici* deny that the government *ever* could have a compelling interest in forbidding for religious purposes an activity it permits for secular purposes. Certainly no such interest was demonstrated here. As the petition ably shows, there are many secular activities that pose the same imagined "threat" to the government's interest that is posed by petitioners' religious activities. As Judge Oakes suggested in his dissent in the court of appeals, one could be jostled in a crowd gathering to hear a speaker on a sidewalk of New York, but that would not justify silencing the speaker; or one could be surrounded by people milling around in a supermarket, but that would not justify burdens on commercial speech of the sort the Port has imposed here. Pet. App. 25. Unless the Port can justify singling out religion for peculiar burdens (and it has not even tried to do so), the regulation must be struck down.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. 110 S.Ct. at 1599. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose

upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

IV. THIS COURT SHOULD REAFFIRM ITS CONDEMNATION OF OFFICIAL HOSTILITY TO RELIGION

Smith clearly marked a major shift in free exercise doctrine. *See* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1120-1128 (1990). One of the departures from the established jurisprudence of the Court was the decision to diminish the independent value previously given to the protection of religious freedom. Instead, the Court construed those cases in which it had ruled for a religious claimant as owing to the presence of another constitutional right in addition to religious freedom. Thus, for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was rationalized because of the parental liberty interest of the Amish in the education of their own children, 110 S. Ct. at 1601.[3]

This hybridization of the inalienable right of religious freedom causes great difficulty for *amici*. We do not view strict scrutiny of governmental rules affecting religious belief and conduct as a "luxury" we cannot afford, *Smith*, 110 S.Ct. at 1605, but as an "essential element of liberty," *id.* at 1616 (Blackmun, J., dissenting). We do not

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[3] This interpretation of *Yoder* turned that decision into a broad victory for all home schoolers, despite strong internal evidence that the Court intended a far more limited result, 406 U.S. at 215-16.

view religious freedom as a sort of constitutional "Hamburger Helper," but as an independent value that is "the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

As with any new formulation of doctrine, the view of religious freedom adopted by the Court in *Smith* is one that requires further reflection by this Court. Whether or not the Court wishes to revisit *Smith* at this time, at the very least it ought not to retreat from the view that "religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *see also Widmar, supra*.

After *Smith*, several governmental agencies have recklessly disregarded the protection that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the local level, zoning laws have been invoked both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. *See, e.g., Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, *app. denied*, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-*Smith* cap on enrollment of students in parochial

school); and *see* R. Gustav Niebuhr, *Here Is The Church*, Wall Street J. (Nov. 20, 1991) at A1. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had a regulation purporting to tell the Amish what to wear when they raise a barn. *See, e.g.*, OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).[4]

The judicial record after *Smith* also betrays a similar insensitivity to religious liberty that may eventually require this Court to reconsider its teaching in *Smith*. For example, in *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring an autopsy was applied to an Orthodox Jew who died in an auto accident, even though this regulation placed a significant burden on a sincerely held religious tenet. This sacrilege was justified by a strikingly unimportant governmental interest (the accuracy of statistics on vehicular accidents), and was manifestly not the least restrictive alternative means of effectuating that low-level governmental interest. In *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990), another district court "regretfully" dismissed on the basis of *Smith* its earlier determination that the government

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[4] This exemption was recently reinstated pending administrative review.

was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of this Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored this Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions. *See Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In *Salvation Army v. Dep't of Community Affairs*, 919 F. 2d 183 (3d Cir. 1990), the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious need to know the identity of the down-and-outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements – which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program – by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep outside on the street than in a building without an elevator. Under *Smith* analysis, however, the bureaucracy wins, and the nuns and the homeless lose. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, New York Times (Sept. 17, 1990) at B1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), overruled in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. *See, e.g.*, Peter Irons, *The Courage of Their Convictions* 22-23 (1988). This Court

could not have intended all of the far-reaching and outrageous results discussed above, whether in the 1940s or in the 1990s. It may be premature for the Court to undertake a review of its teaching in *Smith*, and *amici* note that the Petitioners do not request the Court to do so in this case. But it is not too early for the Court to correct some profound misunderstandings of what this Court actually said in *Smith*. This case is an apt vehicle for the Court to clarify at once that the *Smith* case did not contemplate a casual attitude among the judiciary about religious discrimination. On the contrary, as suggested in Part III above, the *Smith* court taught more emphatically than before that when a statute or ordinance targets a religious practice for hostile treatment – as the Port regulation does – that result can only be justified by a truly compelling governmental interest *in religious discrimination* and by a showing that the governmental burden placed on religion by the regulation is the least restrictive alternative. No such showing was required or made in the courts below.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15, 1789). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the framers could ever have anticipated 200 years ago.

As the nation celebrates the bicentennial of the Bill of Rights, it is time for this Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did here with such ill-

disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
VALPARAISO UNIVERSITY SCHOOL OF LAW
656 South Greenwich Street
Valparaiso, IN 46383
219-464-4233
Counsel of Record

STEVEN T. MCFARLAND
BRADLEY P. JACOB
CENTER FOR LAW AND RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
703-642-1070

THOMAS C. BERG
1642 E. 56th Street, # 1212
Chicago, IL 60637
312-955-1846

Attorneys for Amici Curiae

APPENDIX A

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

Americans United for Separation of Church and State [AU] is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. AU has some fifty thousand individual members of various religious beliefs and some of no religious belief, inclusive of four thousand cooperating religious organizations, with members in all states in the United States, including the State of New York. The organization has been involved in a myriad of cases involving questions of religious liberty, with a number of these reaching the Supreme Court. AU has a vital interest in this case because the issues addressed in this litigation would impact the constitutional freedoms of all religious organizations, not just the Hare Krishna organization.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States, and deals exclusively with issues pertaining to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.,

Inc.; North American Baptist Conference; Progressive North American Baptist Convention, Inc.; Religious Liberty Conference; Seventh Day Baptist General Conference; and Southern Baptists[1] through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to insuring the American people's continued enjoyment of the strong protection afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated

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[1] In addition to its participation in the work of the Baptist Joint Committee, the Southern Baptist Convention now has a special commission, known as the Christian Life Commission, to focus on church-state matters.

the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

Council on Religious Freedom [CRF] is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom. CRF is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries with the full protection of the constitutional guarantees of this nation. CRF speaks to the legal issues raised in this litigation, not because it supports the doctrinal interests of the International Society for Krishna Consciousness but because the loss of freedom for any group represents a loss of freedom for all.

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good

citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins in this brief because it believes that (1) freedom of conscience must include not only the right to believe but also the right to express, advocate, and bear witness to belief; (2) governmental neutrality towards religion is in the best interest of both religion and government, (3) governmental neutrality requires that religious speech be accorded no less protection than other categories of speech.

The National Association of Evangelicals [NAE] was organized in 1942 as a vehicle for united action among evangelical Christians. NAE represents some 43,000 churches from 74 denominations, as well as hundreds of colleges, seminaries, evangelical organizations and thousands of individual members. Through its commissions, affiliates, such as the Evangelical Fellowship of Mission Agencies and National Religious Broadcasters, and through its subsidiary, World Relief Corporation, NAE serves a constituency of more than fifteen million. NAE has frequently testified before Congress and filed many briefs amicus curiae in this Court on matters affecting religious liberty.

The National Council of Churches of Christ in the U.S.A. [NCC] is the cooperative agency of thirty-two Protestant and Eastern Orthodox religious bodies having

an aggregate membership of over 40 million in the United States. It does not purport to speak for all these constituents but for its General Board of some 250 members, made up of the representatives of the member communions in proportion to their size and support of the Council. In furtherance of the policies adopted by the Board over the years supporting religious liberty, the NCC has entered briefs *amicus curiae* in several cases affirming the right of religious groups to disseminate their messages and to solicit support from the public for those messages in places properly opened to the public.

FEB 18 1992

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Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE A BRIEF BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondent has refused its consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. Historically, the AFL-CIO and its member unions, have had a vital interest in the First Amendment rights

of citizens to disseminate their views among the public by handbilling and other peaceful means. Indeed, many of the leading cases that this Court has decided in the First Amendment area—including many of the "public forum doctrine" cases—have involved the efforts of union members to engage in peaceful handbilling and other expressive activities. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Because of the AFL-CIO's vital interest in this area, the Federation has filed briefs as an *amicus curiae* in a substantial number of this Court's recent "public forum" cases. *See, e.g., United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

3. Respondent in this case has argued, *inter alia*, that the government, in order to minimize public congestion and annoyance, may broadly prohibit members of the public from engaging in any handbilling activities on a public property other than a street or park, unless the government has purposefully dedicated the property to public expressive activities. Should such a broad argument be accepted by this Court, the ability of citizens to peacefully disseminate their views to the public at large would be severely curtailed. The attached brief *amicus curiae* examines those prior decisions of this Court—and their underlying logic—which have established and defined the right of a citizen to disseminate ideas to fellow citizens on public properties that have traditionally been open for public gathering and free communication. As we show, the bounds of this right are far broader than respondent concedes, and more than broad enough to invalidate the rule at issue in this case.

4. In preparing the attached *amicus curiae* brief, we have consulted with counsel for petitioners to ensure that the views and arguments therein will not merely be repetitive of those presented in petitioners' brief. The AFL-CIO has also requested consent from all parties for the filing of the attached *amicus curiae* brief. Counsel for petitioners has given the AFL-CIO consent. Counsel for respondent initially gave consent; but, after this Court granted a motion by petitioners for an extension of time for the filing of petitioners' brief, counsel for respondents refused consent for the filing of the attached *amicus curiae* brief unless it was filed and served pursuant to the original, unextended schedule.

5. This motion, with the attached brief, is being filed and served within the time allowed by the Court for the filing and service of the brief of petitioners, as provided in the rules of this Court.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Port Authority of New York and New Jersey ("Authority") absolutely prohibits any individual, while present in any of the public interior places of the three major New York metropolitan airports, from distributing to "passers-by in a continuous or repetitive manner" *any "printed or written material" whatsoever.* Appendix to Petition in Case No. 91-155 ("Pet. App.") at 84. The

Authority does *not* provide for any means of obtaining an exception based on a willingness to respect reasonable limits on the time, place, or manner of a proposed distribution, or for any system of permits that would allocate, on a non-discriminatory basis, the opportunity to distribute writings to others in a peaceful and nondisruptive manner.

The Authority's rule thus effectively bans *all* efforts by members of the public to disseminate written ideas among the many millions who pass through these massive and bustling crossroads of national and international commerce. And, the Authority has done so regardless of how compatible and inoffensive any particular distribution would be to its various legitimate interests.

Closing a location that has traditionally served as a place of public gathering and interaction to all literature distribution strikes at the very heart of the First Amendment's fundamental rights of free speech and free press. The decision of the court of appeals holding this anti-distribution rule unconstitutional should be affirmed.[1]

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[1] The Authority also prohibits soliciting funds from "passers-by in a continuous or repetitive manner" in the public interior places of the airports. Pet. App. 84.

The court of appeals upheld this rule reasoning that this Court's recent treatment of a solicitation rule in *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990), justifies prohibitions on face-to-face solicitations that would *not* be justified regarding literature distributions. *See International Society for Krishna Consciousness ("ISKCON") v. Lee*, 925 F.2d 576, 581-82 (2nd Cir. 1992).

Although we believe that the Authority's prohibition of literature distributions and its prohibition of solicitations are both unconstitutional, we will only discuss the prohibition on literature distributions in this brief. We focus on the prohibition of literature distributions because we regard the activity of peacefully disseminating written materials to the public in a place of traditional public gathering as perhaps the purist and most basic exercise of the rights of free speech and free press protected by the First Amendment, and thus the exercise most entitled to public concern and to constitutional protection. See p. 12, *infra*.

The interior air terminal spaces subject to the Authority's absolute ban on literature distributions include many public places entirely open to the public that are frequented by vast numbers of persons from all corners of the nation and the world who shop, spend idle time, and otherwise interact in a generally unstructured and unmonitored manner. As the magistrate below found:

> The airport terminals under Port Authority control are busy places containing large open lobbies and corridors lined with a variety of shops, restaurants, and other businesses. . . . For example, the second-floor lobby of the International Arrivals Building at Kennedy is bordered by two restaurants, two snack bars, a bar, a postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, and two currency exchange facilities; it also contains a dental office and a place for the display of art exhibits. . . . The second-floor corridors are lined by eight duty-free shops, four bars, two snack bars, a bank, two currency exchanges, two bookstores, two newsstands, two cookie/candy shops, four travel insurance areas, a cash/traveler's check machine, and a retail Bloomingdale's; they also contain seating facilities and free-standing advertising displays.
>
> The Port Authority-controlled areas are open to the public at all times. The Port Authority does not deny or monitor the access of the general public to the three airport complexes or to the general-circulation areas in the buildings. . . . Thus, the facilities are freely available to all persons, whether or not they have travel-related tasks. . . . In 1986, the airports served 78,846,000 passengers; this number is expected to increase to 110 million in the 1990s. [Pet. App. 53-54 (internal citations omitted).]

In these respects, the airport terminal areas at issue here are not materially different from those in other major public terminal facilities, all of which have become public gathering places in which citizens freely meet

and exchange information and opinion. And, for decades, every court of appeals that has confronted issues relating to First Amendment activities in such terminals has agreed that these locations are wholly appropriate places for citizens to exercise their First Amendment right to disseminate ideas and written materials to the public.[2]

These numerous and consistent judicial decisions recognize the social fact that the major transportation centers of our society—where millions from varied origins and with diverse destinations freely congregate, sit, shop, rest, eat, and generally intermingle—are places where, for decades, handbilling and other First Amendment activities have been pursued without disruptive, or other deleterious, effect.[3]

The Federal Aviation Administration ("FAA") has likewise recognized that "it has become common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." FAA,

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[2] *See, e.g., Jamison v. City of St. Louis*, 828 F.2d 120 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Southwest Africa/ Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) *("Southwest Africa")*; *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) *("CAMP")*; *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). *See also ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973).

[3] The court below recognized this "unanimous authority" as "well-established" and of "considerable weight," and went on to hold that the Authority's rule banning all literature distributions is unconstitutional, even though the court affirmed the validity of the anti-solicitation provisions contained in the Authority's rules. *See* note 1, *supra*.

Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (1980) ("FAA Notice of Rule"). And, the FAA has, consistent with the unanimous view of the courts of appeals, concluded that, because of "the considerable amount of social and commercial interchange in [airport] terminals," parts of these terminals are "in many respects . . . like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion, and the right of peaceable assembly apply." *Id.* The FAA, in administering its own airports, has, moreover, accepted the reality that handbilling and other First Amendment activities can be carried out without interfering with a major airport's substantial interests, as long as such activities conform to reasonable time, place, and manner restrictions. *Id. See also* 14 C.F.R. §§ 159.93-.94 (1991) (rule establishing time, place, and manner restrictions for handbilling at National and Dulles Airports) ("FAA Rule"); 45 Fed. Reg. 70237 (1980).

In this litigation the Authority has argued that this unanimous and well-established understanding should be rejected in favor of the rule that the government may prohibit *all* distributions of literature within the interior public spaces of air terminals. The Authority contends that areas within public air terminals—whatever their use—are not *intended* to be used for public discourse. *See* Brief of Respondent to Petition for a Writ of Certiorari ("Resp. Br."), at 15. And the Authority adds that this Court's recent precedents have effectively limited the right to disseminate writings on public locations to traditional "streets and parks alone," leaving the government free to totally prohibit such activities *in all other public locations*. *See ISKCON v. Lee*, 721 F.Supp. 572, 577 (S.D.N.Y. 1989) (discussing the Authority's argument that a total ban on airport leafletting is valid because "the scope of the traditional public forum . . . classifica-

tion is a narow one, limited to 'streets and parks' alone, both of which [the Authority] categorizes as a 'unique species of public property' ").

This line of argument denies all generative import to a fundamental premise of our First Amendment law, and would destroy the principled foundation of that law. *See* pp. 21-25, *infra*. Of at least equal consequence, "[a]s society becomes more insular in character," *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013, 5018 (1990) (Kennedy, J.), the Authority's approach would, as a practical matter, severely inhibit "the free flow of ideas and opinions" that is "[a]t the heart of the First Amendment." *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). *See* pp. 26-27, *infra*.

2. In Part I of this brief, we examine the constitutional considerations that led this Court, more than 50 years ago, to uphold a citizen's right to distribute written materials in those public places where the public has traditionally been free to gather and exchange views. Citizens disseminating their ideas among the public in this fashion are participating in the processes of public debate through which the citizenry as a whole formulates its sovereign will to direct the government. *See* pp. 8-9, *infra*. Recognizing this, the decisions of this Court have repeatedly held that when the government holds property open for the free and unstructured use of the gathering public, members of the public have a constitutional right to peacefully engage in such activities as the distribution of handbills. *See* pp. 9-12, *infra* (discussing cases).

More recent cases holding that various forms of public property need not be made available to individuals seeking to use them for expressive purposes have not involved public locations where citizens have been traditionally free to gather and exchange views, but have involved instead

individual demands of access to government properties that have traditionally been devoted only to more specialized, limited, and structured public uses, or to specialized, government-sponsored and managed media of communications. These more recent cases, however, have not questioned the continued vitality of the principle that where public property is held for free public gathering and interchange, the government may not prohibit efforts by members of the public to engage in such activities as handbilling in order to disseminate their views. *See* pp. 12-14, *infra*.

In Part II, we examine the status of the public areas of major air terminals within this framework. As we show, air terminals contain extensive areas designed to replicate the public streets and plazas, to be held continuously open to the public, and to invite the public to gather and engage in free and unstructured use, including, as members of the public see fit, free discourse and the exchange of ideas and views. *See* pp. 14-17, *infra*. On these properties, just as on the streets, handbilling can be—and has been—regularly conducted in a wholly nondisruptive manner. *See* pp. 17-18, *infra*. Moreover, these areas, as places where people with varied origins and destinations congregate and meet, are uniquely valuable for the exchange of information and ideas among the gathering public at large. In essence, transportation terminals connect a locality to the outside world and to outside ideas, and, for this reason, have traditionally been used for extensive communicative activities. *See* pp. 18-19, *infra*. For all these reasons, handbilling has been a normal activity in air terminals for some time. Indeed, the tradition of using air terminal public areas for such communicative activities as handbilling extends over a significant portion of the history of the large, public, commercial air terminal. *See* pp. 19-20, *infra*.

All this being so, the public areas of air terminals are squarely within the free-speech and free-press prin-

ciple that this Court has recognized; *viz.*, that in those public areas where citizens have been traditionally free to gather and exchange views as they wish, such activities as handbilling are constitutionally protected. *See* pp. 20-21, *infra*.

ARGUMENT

1. The Purposes Of The First Amendment And Of The Public Forum Doctrine

A. In evaluating the Port Authority's position in this case, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the purposes of the public forum doctrine particularly.

1. This Court has long recognized that the First Amendment rights of free speech and free press are at the very foundation of our system of government, which is based on the "consent of the governed." *See New York Times v. Sullivan*, 376 U.S. 254, 273-75 (1963).[4] "The consent of the governed" implies not only that consent shall be uncoerced, but also that it shall be informed. Free access to the ideas and views of our fellow citizens is thus essential if our government and our culture are to reflect the free deliberative choices of our citizenry. *See Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); *see also* T. Emerson, The System of Freedom of Expression, at 7 (1970).

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[4] *Cf.* The Federalist No. 39, at 190 (Bantam ed. 1982) (Madison) (defining "republic" as a political system in which all authority is derived "from the great body of the people"); The Declaration of Independence, para. 2 (1776) ("Governments . . . deriv[e] their just powers from the consent of the governed").

The First Amendment, therefore, "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). And, a citizenry denied by the government the *practical* opportunity to freely share information and views, debate, and deliberate is denied "the absolute sovereignty" which our system presumes shall forever rest with "[t]he people, not the government." *New York Times v. Sullivan*, *supra*, 376 U.S. at 274 (*quoting* James Madison's comments on freedom of the press, 4 Elliot's Debates, at 569-70 (1891 ed.)).

The First Amendment rests as well on the premise that the free interchange of ideas is necessary to "secure [for the citizenry] 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times v. Sullivan*, *supra*, 376 U.S. at 266 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)). As this Court recently declared, "[t]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine v. Falwell*, *supra*, 485 U.S. 46, 50-51 (1988) (*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

In the words of Judge Learned Hand, "[t]o many this is, and always will be folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (*quoted in New York Times v. Sullivan*, *supra*, 376 U.S. at 270).

2. These First Amendment principles are the foundation of the line of precedents that treat with a citizen's right to broadly disseminate ideas to the public at large while present on those public locations upon which the public has traditionally gathered. Professor Stone has aptly summarized their point as being that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court. Rev. 233, 245.]

In *Hague v. CIO*, 307 U.S. 496, 501 (1939), this Court held unconstitutional a municipal ordinance which prohibited *inter alia* the distribution of leaflets and pamphlets on "any street or public place." Justice Roberts' plurality opinion rejected the proposition that, because the government owned the public places at issue, the people's ability to engage in such First Amendment activities was "absolutely under the control of the legislature." *Id.* at 515. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 513 (*quoting United States v. Cruikshank*, 92 U.S. 542, 552-53 (1875)). That being so, "communicating thoughts between citizens, and discussing public questions," entailed a "use of the streets and public places [that] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515. As Justice Roberts emphasized, the government's interest in the ownership of the property at issue was not analagous to a private individual's interest in the ownership of his property. Rather, the property at issue was "held in trust for the use of the public." *Id.*

In *Schneider v. State*, 308 U.S. 147 (1939), the Court expanded on the lessons of *Hague* and invalidated a series of municipal ordinances which *inter alia* made it "unlawful for any person . . . to circulate or distribute any . . . circular, hand-bills, cards, posters, dodgers or other printed . . . matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock, or other public place, park, or ground." *Id.* at 155. In rejecting the argument

that such ordinances advance the municipal interest in reducing litter and congestion, the Court stated, "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Id.* at 162:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. [308 U.S. at 161 (footnote omitted).]

Jamison v. Texas, 318 U.S. 413, 416 (1943), once again emphasized the importance of a citizen's right to spread ideas to the public in public places:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communications of ideas by handbills and literature as well as by the spoken word.

And the Court reaffirmed this principle in *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943):

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal means . . . that stringent prohibition can serve no purpose but that

forbidden by the Constitution, the naked restriction of the dissemination of ideas. [*Id.* at 146-147.]

3. The importance of *Hague v. CIO* and its progeny to the health of our system of free expression and self-government cannot be overstated. Put simply, most citizens wishing to participate in the broad public debate do not have access to the privately-owned mass media. For these citizens, effective opportunities to reach their fellow citizens in public places are of the essence.

The right to peacefully distribute handbills in public places in order to disseminate one's views to the public is thus the paradigm of a citizen's exercise of his rights of free speech and free press. *See, e.g., Lovell v. Griffen*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); *Martin v. City of Struthers, supra*, 319 U.S. at 147 ("distribution of circulars is essential to the poorly financed causes of little people"); *see also Ex Parte Jackson*, 96 U.S. 727, 733 (1878) ("Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

B. The constitutional doctrine that the government must permit communicative activities among the public on those public properties where citizens have traditionally been permitted to assemble and engage in free discourse has been repeatedly reaffirmed. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976).

At the same time, however, new issues have arisen regarding the nature and extent of a citizen's right of access to various forms of public property *other than those*

that have been traditionally open to public assembly and the free interchange of ideas. Recent cases have focused on individuals seeking to use specialized, government-established media of communication for distribution of their messages, *see, e.g., Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788 (1985) (federal workplace charity drive); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (internal office mail system); and on individuals seeking access to highly specialized public property which traditionally has not been open to the general public for free gathering and discourse, *see, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (access to military base); *Adderly v. Florida*, 385 U.S. 39 (1966) (access to prison grounds).

As the opinions explain, in these contexts the Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius, supra*, 473 U.S. at 800. In order to weigh those interests, the Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum." *Id.* at 802.

In the first category, the "traditional public forum"—which includes those public places, like streets and parks, where members of the public have been traditionally free to gather and communicate with each other as they see fit—the government's ability to prohibit expressive activity is sharply circumscribed. *Cornelius, supra*, 473 U.S. at 802. Generally, in such places, the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open

ample alternative channels of communications." *Perry*, *supra*, 460 U.S. at 45.[5]

In the second category, the "designated public forum" —which includes those government properties intentionally devoted to the purpose of public debate—the same rules apply. *Perry*, *supra*, 460 U.S. at 45-46.

And, in the third category, the "nonpublic forum," the "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable." *Id.* at 46. Of course, even in this category, "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all surrounding circumstances." *Cornelius*, *supra*, 473 U.S. at 809.

II. The Airport Terminal As A Public Forum

A. As we have already noted, *see* pp. 3-5, *supra*, "an unusual consensus of judicial, legislative and administrative opinion would classify the public areas of [airport terminals] squarely within the public forum family." *Southwest Africa*, *supra*, 708 F.2d at 766. These decisions are the result of repeated and detailed analyses of the structure and functions of modern airport public

[5] As the Court has emphasized, the requirement that "regulations of the time, place, and manner of expression" must be "narrowly tailored to serve a significant government interest" operates to prevent governments from improperly banning expressive activities from the particular public forum locations reasonably chosen by a speaker, *even when the government allows expression at alternative sites. See, e.g., United States v. Grace*, *supra*, 461 U.S. at 180-81 (rejecting argument that prohibition of leafletting on Supreme Court's sidewalk was a reasonable regulation of "place" because leafletting was still permitted on other sidewalks in "the vicinity of the Supreme Court"; specific prohibition at issue must have "sufficient nexus with . . . the public interests . . . urged as its justification"). *See also Schneider*, *supra*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

areas as well as of the traditional and intended uses to which these areas have been put.

In essence, the consensus reflects that the public areas of airports are held for public use in the same way as are streets and parks—*viz.*, for generally unstructured and unmonitored use, so that members of the public are free to sit, walk, wander, meet, congregate, converse, discuss, and debate, as they see fit—and that the communicative activities that members of the public may choose to pursue in these areas do not impede the realization of any valid overriding governmental interest.

First, public terminal areas are functionally and structurally similar to public streets and plazas. These areas typically contain "many of the facilities and services of a fair-sized municipality," (*Southwest Africa*, *supra*, 708 F.2d at 864), including facilities "where air travelers as well as the general public may shop, dine, imbibe, and sightsee" (*Fernandes*, *supra*, 633 F.2d at 627).

The terminals in the present case, for example, contain large plazas for sitting, talking, and waiting, which are lined by cocktail lounges, informational displays, art displays, banking facilities, and a boutique. The public areas of an airport not only appear physically similar to public streets, but like a street, invite the members of the public to spend substantial free and unstructured time, during which they may freely wander, shop, meet others, congregate, converse, debate or pursue whatever other lawful activities they may choose. *See* p. 3, *supra; see also* Pet. App. 53-54.

Indeed, the presence of these myriad facilities reflect a conscious effort by the airport authority to replicate, for use by the public in the airport community, the very essence of the diverse and busy public commercial street.[6]

[6] *Compare United States v. Kokinda*, *supra*, 58 L.W. at 5015 (plurality opinion) ("postal sidewalk was constructed solely to assist

Second, as is the case with public streets and parks, the government makes no effort whatsoever to limit who may enter the public airport terminals. These public areas, like the streets and parks, are wholly and continually open to any member of the public who wishes to enter. As with streets and parks, persons need not identify themselves, record their presence, or announce their purposes. *Cf. Fernandes*, *supra*, 663 F.2d at 627 ("The analogy between these terminals concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the . . . passageways. . . ."). Indeed, the general public may enter not only for travel-related reasons, but to use the shops and other facilities of the terminal or to spend idle time in any lawful way. Thus, as with a public street, members of the public have an open invitation to pursue their chosen affairs in these areas.

Third, to the extent the purpose of the public spaces of a modern transportation terminal can be characterized as a specialized one, it is the *same* "specialized" purpose that characterizes public streets; *viz.*, to facilitate movement and transportation. Certainly the movement of people through terminal avenues toward the entrances to airport gate areas is no different an activity than the movement of people through public streets toward subway stations, bus stops, or ferry landings. In this regard, the Second Circuit's earlier discussion of New York's bus terminal is equally relevant here:

> [Passengers] are in the Terminal for the principal purpose of moving to and from other means of . . . transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would

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postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood").

> attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living. [*Wolin*, *supra*, 392 F.2d at 89.]

As *Wolin* so convincingly demonstrates, the terminal plazas and avenues at issue here, though enclosed, serve no function other than that which streets have traditionally served. Certainly the mere presence of a roof cannot make a difference in First Amendment jurisprudence. Covered public streets and commercial districts have existed in many cities for centuries, and exist today in such cities as Minneapolis and Spokane where weather conditions render such enclosures necessary. Meteorology, transportation technology, and public architecture have not heretofore been thought to be the sciences that limit the scope of the First Amendment.

Fourth, an airport terminal shares the characteristics that make expressive activity appropriate to, and compatible with, the myriad other activities that take place on an urban street. Unlike an office or a courthouse, for example, a terminal's normal uses are not those that require silence, privacy, or solitude: its inhabitants are not normally engaged in solemn or reflective activities. *See Wolin*, *supra*, 392 F.2d at 89; *see also CAMP*, *supra*, 508 F.2d at 925. Rather, like a street or a covered downtown marketplace, a terminal is often "attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin*, *supra*, 392 F.2d at 90. And, when such active and stimulating tumult is the natural condition of a public area, there is no realistic need to sup-

press expressive activities such as handbilling in order to assure the area's smooth, uninterrupted operation.[7]

Put simply, the terminal spaces, like city streets, are locations where neutral and reasonable time, place, and manner restrictions on expressive activities can accommodate all substantial competing interests of the government and of the public. There is simply no legitimate need for the government to go further and enact a total prohibition. *Cf.* FAA Rule, *supra* (establishing detailed time, place and manner restrictions on leafletting at Dulles and National Airports); FAA Notice of Rule, *supra*.[8]

Fifth, the public areas of air terminals are by their nature an invaluable location for communicative activities. Like other transportation terminals, air terminals connect a locality to the outside world, and to the outside world's peoples and ideas. Because of this unique attribute of transportation terminal areas, prohibiting expressive activities in such locations has a particularly deleterious effect on the ability of citizens to spread their ideas to those from other regions and to learn from those who wish to spread distant ideas to them.

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[7] We emphasize in this regard that the expressive activities here present no issues of perceived government sponsorship of any particular message or of abdication of government control over its own specialized means of communications. *Compare Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Cornelius*, *supra*; *Perry*, *supra*. As with expressive activities on the streets, all understand that expressive activities in air terminals are wholly private activities engaged in by private citizens who are exercising their First Amendment rights in a public gathering place.

[8] As we have noted, for many years, it has now been the law—as developed by the unanimous holdings of the courts of appeals—that interior airport public places are public fora. This law has not caused any significant problems in the nation's air transit system precisely because reasonable time, place, and manner restrictions, like those that apply to urban streets, can—and indeed do—adequately protect all significant interests, while allowing continued use by the public of these places for communicative activities. *See* pp. 3-5, *supra*.

This attribute of transportation terminals has been recognized—and acted on—throughout our history. For example, whistlestop political speeches at rail terminals have been parts of countless political campaigns and, indeed, have become a part of our political folklore. More recently, "freedom riders" used the facilities of bus terminals to spread the ideas of the civil rights movement throughout the South. And, in contemporary America, we are all familiar with the phenomenon of crowds of well-wishers, protesters, photographers and journalists—and simply the curious—gathering at airports to witness the arrival or departure of a politician, public figure, sports team, or wartime military unit, with the event often accompanied by speeches and rallies, and with free expressions of views among those who attend.

The fact that a transportation terminal connects the people and ideas of a locality with those of the outside world influences communicative activities in the terminal in a more commonplace way as well. A terminal is a place in which people from varied and distant regions—who may have quite different views and backgrounds—may meet freely and communicate ideas. It is precisely this attribute of a terminal—the unique opportunity to reach an audience from a different region with a different message—that has motivated handbillers, for a wide variety of causes, to select the terminal as a location for exercising their rights of free speech and press.[9]

Finally, as the years of cases relating to airport handbilling and solicitation practices reflect, there is in fact

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[9] Handbillers in transportation terminals may often be seeking to communicate with a particular audience that may be far too dispersed or otherwise difficult to reach outside of the terminal. In *Wolin*, for example, the handbiller was seeking to communicate an anti-war message to soldiers who came from outside the New York area, but who passed through the terminal in great numbers. 392 F.2d at 90-91.

a specific and significant tradition of using the public areas of airports and other terminals as places for engaging in public expressive activities. *See* pp. 3-5, *supra*. It is highly relevant in its own right that—*for a significant portion of the history of large urban airports*—many members of the public have indeed used air terminals for precisely the expressive purposes at issue here. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815, n.32 (1984) (referring to the public forum as government property "clearly held in trust, either by tradition *or recent convention*, for the use of citizens at large") (emphasis added). The decisions that we have reviewed above concerning terminal facilities establish that there is *at least* a "recent convention" of the use of such facilities for the specific expressive purpose of handbilling. Moreover, given that the social importance of commercial air travel is itself a relatively recent phenomenon, the extensive tradition of using air terminals as places for this activity of public discourse should carry particular weight.

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Taken together, the foregoing factors make clear that the public interior areas of air terminals are places where members of the public have traditionally had the full freedom to conduct themselves in the same manner as they are free to do in the public streets and parks. This includes the freedom to meet together in an unstructured and unmonitored manner as free citizens and, as such, to assemble, converse, discuss, and debate whatever subjects they may choose. For these constitutionally weighty reasons, "it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such non-forums as prisons, buses, and military bases." *Southwest Africa*, *supra*, 708 F.2d at 764.[10] It follows, we sub-

[10] *Compare Adderly v. Florida*, 385 U.S. 39 (1967) (prison grounds not public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (inside of public bus is not public forum); *Greer v. Spock*, *supra* (military base is not public forum).

mit that the airport terminals in the present case constitute quintessential public fora and, thus, that the Authority's total ban on the fundamental free speech and free press right to distribute written materials is unconstitutional.[11]

B. The Port Authority has based its argument that air terminals are not traditional public fora on two theories: first, that air terminals are distinct from public fora because the "terminals' purpose is *not* 'public assembly and debate' "; rather "their sole purpose is the facilitation of air travel," Resp. Br. 15; second, that this Court's precedents limit the areas to be classified as traditional public fora to "streets and parks alone" so that no other public areas can qualify. *See ISCKON v. Lee*, *supra*, 721 F. Supp. at 577; Resp. Br. 15 & n.12. Neither of these arguments can withstand reasoned analysis.

1. In considering the Authority's first argument, it is useful to return to the early public forum cases. Those precedents make unmistakably clear that the public forum concept, even at its inception, in no way turned upon whether a particular location was created *for the specific purpose* of facilitating free public debate. Rather, the relevant inquiry is whether the place in question has been held open for unstructured and unmonitored use, which would include free communication among free citizens.

This understanding of the relevant inquiry is evident as early as *Hague*, which emphasized that the public

[11] *Heffron v. ISKCON*, 452 U.S. 640 (1981), is not to the contrary. The question in *Heffron* was not whether the forum in question (a state fairground) was a public forum, but whether the challenged restriction—which confined leafletting and solicitation to assigned booths—constituted a reasonable time, place, and manner regulation in light of the particular nature of the state fair. *See Heffron*, 452 U.S. at 647-48. If the Authority here had only restricted literature distribution to specified areas within the airport terminal, a very different case would be presented.

areas at issue had been places that free citizens traditionally *had used* for gathering together in public and for communicating among themselves according to their wishes, not that these were places created by governments *for the purpose* of facilitating such gatherings or communications. Indeed, *Hague*'s whole point is that such communicative activities are and always have been normal activities in the public lives of free citizens—and for that reason are not subject to government prohibition—not that such activities are to be conducted only at locations to be created by the government for such purposes. As *Hague* put it, the relevant public places "have immemorially been held in trust for the use of the public *and*, time out of mind, *have been used* for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515 (emphasis added).

This is as it must be. As all have recognized, the principal purpose of streets (and airports) is transportation. And this point has been repeated in precisely those cases which have emphasized the right of citizens to use the streets for peaceful expressive activities. *See, e.g., Schneider, supra*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their community's streets open and available for movement of people and property, the primary purpose to which streets are dedicated."); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement.").[12]

The governing rule is that the First Amendment nonetheless requires that the weighty free speech rights of

[12] The public forum cases reaffirming the people's right to use *parks* for the dissemination of ideas have similarly recognized that the primary purpose of parks is recreation, not expression. *See, e.g., Hague, supra*, 307 U.S. at 505 ("there is no competent evidence that the parks of Jersey City are dedicated to any general public purpose other than the recreation of the public").

the people be accommodated in the operation of the streets and parks. *See generally, Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks").

In short, neither streets nor parks are maintained for the principal purpose of providing a place for expression. But this Court has nevertheless repeatedly held that such public areas—*as places where free citizens have been free to gather and communicate*—are public fora.[13]

There is yet another reason why the early public forum cases demonstarate that a location's status as a "traditional public forum" cannot depend on whether it is the government's purpose that the location be a place for expressive activity. In every one of those cases, and in their progeny, the government clearly and unequivocally *denied* having *any* such purpose. It is precisely

[13] Of course, the primary purposes of streets, parks, and other public locations are relevant to the ultimate validity of any time, place, or manner restriction on speech. Even in the most traditional public forum, expressive activity may be limited through neutral, reasonable, and narrowly tailored time, place, and manner regulation:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [*Hague*, 307 U.S. at 515-16.]

The point is that the non-expressive purposes of the public location do not foreclose or determine the public forum inquiry; rather, these purposes are taken into account in the consideration of what regulations of time, place, and manner will be considered reasonable. *See also Schneider, supra*, 308 U.S. at 160-61; *Grayned v. City of Rockford*, 408 U.S. 102, 115-17 (1972); *Heffron, supra*, 452 U.S. at 647-48 & n.10.

because governments have repeatedly *refused* to dedicate public places to public expression—and instead have asserted the right to ban such expression—that this Court has been faced with repeated litigation concerning prohibitions on speech in public places. *See, e.g., United States v. Grace, supra* (ordinance prohibiting handbilling on public sidewalk in front of Supreme Court building); *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (ordinance forbidding expressive activities on public sidewalk adjacent to public school grounds); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana, supra* (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Martin v. City of Struthers, supra* (ordinance prohibiting door-to-door leafletting); *Jamison v. Texas, supra*, 318 U.S. at 415 (ordinance based upon city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas"); *Schneider, supra* (various ordinances prohibiting leafletting in streets, parks, and other public places); *Hague, supra* (same).[14]

2. The Authority's contention that the "traditional public forum" classification is limited to "streets and parks alone" is wholly without merit for a number of reasons.

First, the prior discussions of "traditional public fora" by this Court simply do not support such a conclusion. For example, *Schneider* invalidated a statute which prohibited handbilling on any "street" or "park" as well as on any "*wharf, boat landing, dock or other public place*

[14] In essence, the Authority's insistence that the "traditional public forum" classification apply only to those places purposefully dedicated by the government as places of free expression is, in essence, an insistence that the "traditional public forum" concept and the "dedicated public forum" concept be treated as a single concept. But this Court has recognized that these are *different* concepts. *See, e.g., Cornelius, supra*, 473 U.S. at 802-803; *Perry, supra*, 460 U.S. at 45-46 & n.7.

. . . *or ground*." 308 U.S. at 155 (emphasis added). *Hague* discussed "streets and public *places*." 307 U.S. at 515 (emphasis added). And, later cases have discussed "streets and parks" *as examples* of traditional public fora, rather than as an exclusive list. *See, e.g., Frisby v. Schultz, supra*, 487 U.S. at 480 (street or park is "archetype of a traditional public forum"); *United States v. Grace, supra*, 461 U.S. at 177 (public fora include "'public places' . . . such as streets, sidewalks, and parks"); *Cornelius, supra*, 473 U.S. at 803 (college campus has "many of the characteristics of a traditional public forum"); *Lehman v. City of Shaker Heights, supra*, 418 U.S. at 303 (examples of public fora would include "open spaces, . . . meeting hall, park, street corner, or other public thoroughfare"); *Carey v. Brown, supra*, 447 U.S. at 460 ("streets, sidewalks, parks, and other similar public places"); *Hudgens v. NLRB, supra*, 424 U.S. at 515 (same); *Marsh v. Alabama*, 326 U.S. 501, 504 (1946) ("streets, sidewalks, and public places").

Second, the logic of the public forum cases do not support the Authority's position. As we have explained, these cases do *not* rest on any notion that streets and parks were created by governments as places to be uniquely devoted to public debate. Rather, *Hague* and its progeny rest on the notion that free citizens, whenever they are free to gather in public places of unstructured and unmonitored use, are free as well to conduct the public business of debating public issues. Streets and parks are paradigm examples of such public places, *not* the exclusive examples.

The Authority's assertion that this Court should treat "streets and parks" as the extent of traditional public fora, is nothing less than a call for separating the prior public forum cases from their intellectual foundations and denying those cases all their generative potential. To do this would be to renounce an important aspect of our First Amendment heritage.

Third, to limit the public forum category to traditional streets and parks—as the Authority urges—is likely to have a long-term debilitating effect on the nature of public discourse in our society. Justice Kennedy has warned that "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, *supra*, 58 L.W. at 5018. That warning goes to the heart of this case.

The role played by traditional streets and parks has declined over recent history. As American life has adapted to the automobile, the suburb, and a host of other technological and architectural developments, the normal routines of life have changed. Today, for many of us—perhaps most of us—the casual daily interactions of social life have been removed from the traditional public street and relocated to less traditional, though closely analogous, public locations. If the public forum doctrine is stultified, by treating the doctrine as a historical accident rather than a statement of basic First Amendment principles, then the places for public discourse will grow steadily fewer, and the vitality of our democratic debate will grow steadily weaker.

Given the tragedy that this would represent, the newer locations of public assembly and interchange must be treated as public fora "even though the Government may intend to impose some limitations on the forum's use." *Kokinda*, *supra*, 58 U.W. at 5018 (Kennedy, J.). "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *Id.*

As we have shown, this is a case controlled by the objective considerations that stand behind the public forum doctrine. *See* pp. 15-21, *supra*. As the property is devoted to free and unstructured use of the gathering public, the government must respect the free speech and

free press rights of that public to engage in the public business of free discourse and debate.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be affirmed to the extent that it holds unconstitutional the Authority's rule prohibiting literature distributions.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER LEE, Superintendent of Port Authority Police,

Cross-Petitioner,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Cross-Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION IN SUPPORT OF CROSS-RESPONDENTS

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400
*Counsel of Record
Attorneys for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Nos. 91-155, 91-339

International Society for Krishna Consciousness, Inc., and Brian Rumbaugh, *Petitioners,*

v.

Walter Lee, *Respondent*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THIS CASE[1]

Amicus curiae, the Free Congress Research & Education Foundation, is a non-partisan, non-profit public policy research institute formed in 1977. It is dedicated to advancing traditional values through, among other activities,

[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

(i) education and research on issues of legal and social policy, state policy (including the initiative and referendum process), fiscal responsibility, and institutional reform, and (ii) training in conservative governance and coalition leadership, both in the United States and throughout eastern Europe and the new independent states.

Amicus strongly supports free speech, religious liberty, and free enterprise. Amicus strongly opposes restrictions on speech upon public property such as major airports, and believes that the free exchange of ideas is crucial to effective democratic government and to the betterment of individuals, families, and society.[2]

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[2]Amicus participates in the case to oppose the Port Authority's restrictions on speech upon public property and to promote the free exchange of ideas. Amicus and its counsel are not affiliated with ISKCON in any way, do not endorse ISKCON's religious beliefs in any way, and in fact find ISKCON's religious beliefs distasteful. However, the freedom of speech of all citizens and of ISKCON stand and fall together. As this Court has said,

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943).

SUMMARY OF ARGUMENT

The Second Circuit incorrectly held that the municipal airports in this case are not public fora and that the Port Authority may ban charitable solicitation in the public areas of those airports. (The Second Circuit correctly held that the Port Authority could not ban literature distribution.) The Port Authority's ban of literature distribution and charitable solicitation contravenes a foundational principle of the first amendment: "that the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes's well-known and oft-cited formulation is based on the political and economic philosophy of Milton, Locke, the framers, and J.S. Mill, and wonderfully captures the essence of free speech.

This "marketplace of ideas" should be governed by the same limited-government principles that work best in the market for goods and services. Just as free economic markets perform better than regulated economies, the marketplace of ideas is most likely to produce truth (or at least the best solution to any given problem) with less government interference and more citizen input. Government simply is not competent to control either ideas or economic markets.

Just as government intrusion distorts economic markets, the Port Authority has distorted the marketplace of ideas in this case by attempting to close part of that market. Unfortunately, the Port Authority has chosen to close a mar-

ket/forum that is most accessible to the non-powerful, leaving them at a severe government-imposed disadvantage in the marketplace. ISKCON's alternative fora, if any, are less available (because more expensive) and are less effective.

Finally, both aspects of ISKCON's activities in the New York airports are protected under the first amendment. Literature distribution and charitable solicitation often occur together (often out of economic necessity). The many previous cases decided by this Court reflect that reality and make no distinction between the two activities, but protect them together. The same should be true here.

INTRODUCTION

The economic marketplace works best when it is not distorted by government control and regulation. *The same is true of the "marketplace of ideas,"* and that is a central message of the first amendment's free speech clause.[3]

This nation has applied economic free market principles more consistently than any other, with the result that our nation's standard of living and ability and willingness to

[3]The marketplace of ideas rationale does not extend to obscenity and erotic materials, which are more characterized by nonideational action than speech. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 61, 70-71 (1976) (plurality opinion) (pornographic expression "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). *Accord*, FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); California v. LaRue, 409 U.S. 109, 118 (1972)

help others have been unrivalled for decades. In light of the interconnection of economic liberty and liberty of expression, it is not surprising that this nation also has applied free speech principles more consistently than any other, with the result that our nation's enduring political stability is unrivalled.

The recent collapse of the communist economies simultaneous with the collapse of the communist governments exemplifies the intertwining of economic freedom and freedom of speech. Unprecedented measures of both economic freedom and freedom of speech have come to the former Soviet Union. While it may not be possible to say which freedom came first, it is clear that they came together (and assisted each other's emergence).

In light of this history in our nation and, recently and dramatically, in our world, the Port Authority's effort to exclude ISKCON from the public fora under its control is an anomaly. (It may very well be that the Soviet republics now allow more freedom for literature distribution and charitable solicitation in airports than does the Port Authority.) More to the point for this Court, the Port Authority's policy is an unconstitutional interference with the "marketplace of ideas" protected by the first amendment.

ARGUMENT

I. THE SEARCH FOR TRUTH IN THE "MARKETPLACE OF IDEAS" IS A PRIMARY JUSTIFICATION FOR THE FREEDOM OF SPEECH.

A. The Philosophers Who Influenced the Framing and Interpretation of the First Amendment Emphasized the Great Value of Permitting Free Expression of Competing Ideas.

1. Milton and Locke

"Any examination of the First Amendment . . . requires a preliminary overview of the British tradition." Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition,* 95 Yale L.J. 857, 876 & n.71 (1986). That tradition includes John Milton's argument in 1643 that the search for truth is best accomplished by competition between ideas rather than by government fiat.

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter.

Aeropagitica, A Speech for the Liberty of Unlicensed Printing 227 (C. Eliot ed. 1937).

Following Milton, John Locke further developed what has become known as "classic marketplace theory." Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 Duke L.J. 1, 6 & n.21. Locke argued that truth is discovered through competition with falsehood and that any authoritatively imposed truth is plagued with the danger of error. J. Locke, *A Letter Concerning Toleration,* in *The Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government) and A Letter Concerning Toleration* 125, 139-43 (J. Gough ed. 1966). For Locke, "truth still stood apart, above, to be striven for." Cole, 95 Yale

L.J. at 877. In Locke's words, "let truth have fair play in the world . . . [and] men the liberty to search after it." *An Essay Concerning Human Understanding,* in *The Tradition of Freedom* 285 (M. Mayer ed. 1957).

2. The Framers of the First Amendment

The framers of the first amendment, like John Locke and armed with his philosophy, were convinced of the danger of error in governmentally decreed truth. That conviction led directly to the first amendment's protection of expression.

> From this pervasive state of ignorance, our liberal forefathers deduced three imperatives: (1) No coercion of conscience of one by the other (out of respect for the responsibility of each); (2) *liberty of speech* for everyone so that all may inquire, argue, and persuade; and (3) the development of institutions that nourish practical cooperation in practical activities, without requiring prior agreement about final ends or personal motivations.

M. Novak, *Free Persons and the Common Good* 93 (1989) (emphasis added).

The framers were also convinced that Milton was correct about the outcome of the competition between truth and falsehood: "truth is great and will prevail if left to herself." Act for Establishing Religious Freedom, 12 Hening's Laws of Virginia 84 (1786) (drafted by Thomas Jefferson and proposed by James Madison).

3. John Stuart Mill

J.S. Mill wrote after the framing of the constitution but before this Court considered any cases under the first amendment. His essay, *On Liberty*, expanded on Milton's and Locke's concept of the competition of ideas and has been ech-

oed in this Court's decisions since the turn of the century. *See* T. Emerson, *Toward a General Theory of the First Amendment* 3 n.1 (1967) (Mill's *On Liberty* is one of the "major sources in the development of the theory" of free speech).

Mill argued that government control of speech interferes with the ability to seek truth,[4] and he justified free speech in part because of the aggregate benefits to society, not merely to the individual speaker.

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

J. Mill, *On Liberty of Thought and Discussion,* in *Utilitarianism, Liberty, and Representative Government*, at 24.[5] Courts that invoke the marketplace model of

[4] *See* Ingber, 1989 Duke L.J. at 6:

> [F]irst, if the censored opinion contains truth, its silencing will lessen the chance of our disovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.

[5] Though Mill is often portrayed as anarchically libertarian, that may not be the case.

> [H]owever libertarian the formal application of Mill's

the first amendment also justify free speech because of its aggregate benefits, and thereby echo Mill. Ingber, 1984 Duke L.J. at 4.

B. This Court Has Relied on the Marketplace of Ideas Rationale More than Any Other.

1. The Earliest Judicial Descriptions of the Marketplace: Justice Holmes

In 1919, Justice Holmes crystallized the political theory of Milton, Locke, the framers, and Mill in one phrase: "free trade in ideas."

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by

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> principles, his was a highly moralistic libertarianism. . . . The arguments he . . . present[s] are too steeped in a moralistic rationalism to allow the conclusions of our contemporary liberals to be drawn from them with any firmness.

Canavan, *J.S. Mill on Freedom of Expression,* Modern Age, Fall 1979, at 362, 368, 369.

> Mill's defense of the regime of free speech . . . was informed not by an undifferentiated libertarianism but by a vision of the progressive enlightened development of a society. . . . Mill's thinking is not adequately reflected by focusing . . . on a mere absence of restraint. The end is social progress through individual character development.

Wright, *A Rationale from J.S. Mill for the Free Speech Clause,* 1985 Sup. Ct. Rev. 158.

In any event, the Court correctly has rejected extreme extensions of Mill's argument for liberty in general, such as an extension to obscenity. *E.g.,* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.14 (1973) (obscenity not protected); California v. LaRue, 409 U.S. 109, 118 (1972) (nonobscene dance on periphery of Constitution).

> free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).[6] Holmes' rationale of "free trade in ideas" has been described as the classic case for free speech.[7] *E.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 675 (1960).

2. Subsequent Applications by the Court

The search for truth in the marketplace of ideas has been the Court's dominant justification for free speech. *See*

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[6]*See* Coase, 6 J. Legal Studies at 1 ("A statement such as this displays an extreme faith in the efficiency of competitive markets and a profound distrust of government regulation.").

[7]Some commentators have pointed out that not everyone agrees that objective truth exists, and have therefore questioned whether the metaphor of a search for truth in the marketplace of ideas retains vitality. *See* Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 965, 974 (1978). Whether or not the end product of the marketplace of ideas is objective truth, however, the process nevertheless yields the best results in an imperfect world. *See* Cole, 95 Yale L.J. at 891 ("[Even i]f we can know the truth only by popular approximation, . . . our concern in protecting speech should not be with truth itself but with the process and results of popular deliberation, i.e., democracy.") *Accord* Ingber, 1984 Duke L.J. at 15 & n.69.

Francione, *Experimentation and the Marketplace Theory of the First Amendment,* 136 U. Pa. L. Rev. 417, 422 & n.13 (1987) ("The marketplace model of the first amendment . . . is the generally accepted judicial choice among first amendment theories."); Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 973 (1978) ("[T]he market theory dominates"). *See also* Chaffee, *Free Speech in the United States* 33 (1967); T. Emerson, *Toward a General Theory of the First Amendment* 3 (1966) ("Maintenance of a system of free expression is necessary . . . as a means of attaining the truth"); G. Gunther, *Constitutional Law* 977 (11th ed. 1985) (Holmes's marketplace rationale for free speech is "among the best known articulations" of first amendment values); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 863-64 (2d ed. 1983) (the development of marketplace theory from John Milton, through J.S. Mill, to Holmes is the "initial justification for a system of free speech"); L. Tribe, *American Constitutional Law* § 12-1 (1978) (the marketplace theory is the "most familiar theory of free speech"); Greenawalt, *Free Speech Justifications,* 89 Colum. L. Rev. 119, 130 (1989) ("The most familiar argument for freedom of speech is that speech promotes the discovery of truth."); Stone, *Content Regulation and the First Amendment,* 25 Wm. & Mary L. Rev. 189, 193 (1983) ("search for truth").[8]

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[8]*See also* Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1, 27 (1977) ("The rationale of the First Amendment is that only if an idea is subject to competition

The Court has on occasion cited Mill directly regarding the competition of ideas. *E.g., Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 189 n.25 (1973) (Brennan & Marshall, JJ., dissenting); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 392 n.18 (1969); *New York Times v. Sullivan,* 376 U.S. 254, 272 n.13, 279 n.19 (1964); *Poe v. Ullman,* 367 U.S. 497, 514-15 (1961) (Douglas, J. dissenting); *Barenblatt v. United States,* 360 U.S. 109, 151 n.22 (1959) (Black & Douglas, JJ., and Warren, C.J., dissenting).

The Court has relied on the marketplace of ideas rationale in many cases,[9] including the following: *Texas v. Johnson,* 491 U.S. 397, 417 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole . . . will go unquestioned in the

in the marketplace can it be discovered (through acceptance or rejection) whether it is false or not.").

[9]As of early 1986, the Court had made 33 references to the "marketplace of ideas" since the first use of that phrase by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (concurring opinion), and had made 14 references to Holmes's phrase "free trade in ideas" since 1925. Cole, 95 Yale L.J. at 894 n.160. Since 1986, the Court has referred to the "marketplace of ideas" an additional three times and to the "free trade in ideas" twice. *See* Texas v. Johnson, 491 U.S. 397, 417 (1989) ("marketplace of ideas"); Shapero v. Bar Association, 486 U.S. 466, 481 (1988) ("marketplace of ideas" and "free trade in ideas"); Hustler Magazine v. Falwell, 485 U.S. 46, 50, 52 (1988) ("marketplace of ideas" and "free trade in ideas").

marketplace of ideas."); *Shapero v. Bar Association,* 486 U.S. 466, 481 (1988) (quoting Holmes and referring to "the constitutional fence around this metaphorical marketplace of ideas"); *Hustler Magazine v. Falwell,* 485 U.S. 46, 50, 52 (1988) ("False statements of fact are particularly valueless: they interfere with the truth-seeking function of the marketplace of ideas."); *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) ("unfettered interchange of ideas") (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969) ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee"); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) ("The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.").[10]

[10]*See also Dennis v. United States,* 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) ("When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.")

II. THE MARKETPLACE OF IDEAS JUSTIFICATION IS A NATURAL COROLLARY TO THIS COUNTRY'S FREE MARKET ECONOMIC SYSTEM.

A. Free Markets in Economics Produce the Best Results.

The collapse of communist and socialist economies elsewhere in the world has provided additional evidence for the conclusion that most economists had already reached: though not perfect, competition in a free market optimizes production, allocation, and overall utility. As Ingber notes, "Economists have praised the laissez-faire economic model as facilitating optimal production and allocation of goods."[11] 1984 Duke L.J. at 5 n.14 (citing M. Friedman & R. Friedman, *Free To Choose* 1-13 (1980); A. Marshall, *Principles of Economics* 63-70 (8th ed. 1950); A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (7th ed. London 1793) (1st ed. London 1776); D. Ricardo, *Principles of Political Economy and Taxation,* in *The Works of David Ricardo* 1 (J. McCulloch new ed. 1888); Evans & Body, *Introduction* to *Freedom and Stability in the World Economy* 1-2 (D. Evans & R. Body eds. 1976); Furubotn, *Worker Alienation and the Structure of the Firm,* in *Governmental Controls and the Free Market* 195, 216-17 (S. Pejovich ed. 1976); Simon, *The Crucial Issue Is Freedom,* in *Dilemmas Facing the Nation* 1 (H. Prochnow ed. 1979). *See also* Director, 7 J.L. & Econ. at 8 ("The short period of [free market] liberalism has been accompanied by as much material progress as took place in all prior times."); Friedman, *Free Markets and Free Speech,* 10 Harv. J.L. & Pub. Pol'y 1, 7 (1987) ("A free society . . . is a more productive society than any other; it releases the energies of people, enables resources to be used more effectively, and enables people to have a better life."); Ingber, 1984 Duke L.J. at 16 & n.72 ("A free economic market, arguably, values goods and services and allocates resources in a manner that maximizes utility.") (citing K. George & J. Shorey, *The Allocation of Resources* 31 (1978); F. Knight, *The Economic Organization* 32-35 (1951); P. Samuelson, *Economics* 38-42 (11th ed. 1980); H. Simons, *Economic Policy for a Free Society* 46-47 (1948)).

[11] Director provides a working definition of "laissez-faire" that applies equally to the market for goods and the market for ideas: "Laissez-faire has never been more than a slogan in defense of the proposition that *every extension of state activity should be examined under a presumption of error.*" Director, *The Parity of the Economic Market Place,* 7 J. L. & Econ. 1, 2 (1964) (emphasis added).

B. The First Amendment's Marketplace of Ideas is Directly Analogous to Free Markets in Economics.

The marketplace of ideas metaphor has had such power and significance (from Milton, through Locke, through Mill, through Holmes, and to the present) because economic freedom and freedom of speech are in fact interconnected.

> There is a direct connection between free markets on the one hand and free speech on the other. That is part of the story of free markets making free men. Interferences with markets constitute and produce interferences with free speech.

does not justify the differential treatment meted out to those who distribute religious literature in airports out of obedience to religious command and those who use airports for the communication of their political convictions or of their commercial messages. The sole reason cited by the court of appeals to justify the regulation – the convenience of travelers rushing late to their planes – does not satisfy the heavy presumption against prior restraint of speech required by the First Amendment. Here, the Port permits a variety of forms of political and commercial speech at the airport, but has carved out a special exception to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. Agencies of the federal and state governments as well as the lower courts have in many instances misconstrued this Court's teaching in *Smith*. When, as here, agencies of government turn a blind eye toward invidious discrimination against a vulnerable religious minority, it is time for this Court to clarify that *Smith* does not countenance official hostility toward religion.

ARGUMENT

I. PETITIONERS ENGAGE IN ANCIENT AND SINCERE RELIGIOUS PRACTICES THAT ARE PROTECTED UNDER THE FIRST AMENDMENT

Krishna Consciousness is a monotheistic branch of devotional Hinduism, formally known as Gaudiya

Vaishnavism. The Hindu religious tradition dates to approximately 3,000 B.C. *See* Larry Shinn, "International Society for Krishna Consciousness," 7 *Encyclopedia of Religion* 266-68 (Mircea Eliade ed. 1987). The bona fide character of this ancient religion has been affirmed by every court in this country, state and federal, that has explored the matter. *See, e.g., Heffron v. ISKCON*, 452 U.S. 640, 652 (1981); *ISKCON v. Barber*, 650 F. 2d 430, 443 (2d Cir. 1981); *Jaffe v. Alexis*, 659 F. 2d 1018, 1020 (9th Cir. 1981); *United States v. Silberman*, 464 F. Supp. 866, 872 (M.D. Fla. 1979) (citing cases).

A. PROSELYTIZING, OR ATTEMPTING TO PERSUADE OTHERS ABOUT ONE'S RELIGIOUS CONVICTIONS, IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

One of the religious practices of the devotees of Krishna Consciousness at issue in this case involves the distribution of religious literature, principally *The Bhagavad-Gita*, a sacred scripture of Hinduism that was formulated around 200 A.D., and that has been called the "New Testament of Hinduism." Edmund Soper ed., *The Religions of Mankind* 10 (1951).[1]

[1] The Bhagavad-Gita was a source of inspiration not only for prominent Indians such as Mahatma Gandhi, but also for the American transcendentalists of the nineteenth century such as Ralph Waldo Emerson and Henry David Thoreau. Walt Whitman and other literary giants of American civilization also cherished the Gita. See Joseph Head and Sylvia Cranston eds., *Reincarnation: The Phoenix Fire Mystery* 227 (1977), and Sylvia Cranston and Carey Williams eds., *Reincarnation* (1984).

This religious practice is, of course, by no means confined to Hindus. For example, the Gospel according to Luke describes the life of Jesus as a journey from the cities and villages of Galilee to the city of Jerusalem in order to "preach and bring the good news of the kingdom of God." (Luke 8:1). The same author, who was the travelling companion of the Apostle Paul on his missionary journeys throughout the Roman Empire, reports that the disciples, in obedience to the direct commission of Jesus himself (Luke 9:1-6; Mt. 28:19-20), "continued without letup teaching and declaring the good news about Jesus as the Christ." (Acts 5:42; 1:8; 20:20).

From the very beginning of the European settlement of this continent, religious communities engaged in strenuous activity to bring the message of Christianity to the natives. For example, the Society for the Propagation of the Gospel in New England was formed in 1649 in response to the efforts of John Eliot to translate the Lord's Prayer and the Ten Commandments into the Algonquin tongue and to preach the Gospel to the natives. *See* Edwin Gaustad, *A Religious History of America* 52 (1966); for a fuller description of the missionary and evangelistic activities not only of the English Puritans, but also of the Spanish, French, and Swedes, *see, e.g.*, Sidney Ahlstrom, *A Religious History of the American People* 103 (1972).

Some religious communities, such as the Jehovah's Witnesses and the Church of Jesus Christ, Latter-Day Saints, are well known for their outreach activities, going door-to-door to share their religious convictions and to distribute religious literature. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court held that although contributions are typically sought by the Witnesses to help

defray the cost of the literature they distribute, that fact did not withdraw the Witnesses' activity from the protection of the Free Exercise Clause, any more than paid advertisements forfeit the protection of the Free Speech and the Free Press Clauses by virtue of their commercial character. *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964). *See also Riley v. Nat. Federation of the Blind*, 487 U.S. 781 (1988) (solicitation of charitable contributions is protected under the First Amendment).

Although not all religious communities in America today engage in the same sort of evangelistic activities, it is fair to say that nearly all religious groups are engaged in some form of outreach to others. In any event, irrespective of whether all such groups engage in proselytizing activities themselves, *amici* are committed to the proposition that all sincere religious practices are entitled to the equal protection of the laws.

B. BEGGING FOR ALMS TO SUPPORT RELIGIOUS MINISTRY IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

Another religious practice implicated by the regulation challenged here is known as *sankirtan*, or begging for alms to support the ministry of the religious community, including its distribution of religious literature. This Court has already recognized this practice as a "ritual" within the protection of the First Amendment. *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981).

Once again, Hindus have no monopoly on this religious practice. For example, the duty of care in ancient

Israel for widows, orphans, strangers, and Levites was typically undertaken not by a formal taxation system, but by voluntary offerings collected on behalf of those in need. *See* Johann Gamberoni, "Almsgiving," 1 *Encyclopedia of Biblical Theology* 16-19 (Johannes Bauer ed. 1970) (collecting biblical texts and secondary literature). The early Christian community clearly appropriated this teaching of the Hebrew scriptures, frequently citing Old Testament texts to reflect high esteem for the practice of almsgiving (1 Cor. 11:20-22; 16:15-17; 2 Cor. 8:1-15; 9: 5-15; Luke 16:19-31; Jn. 13:29). Various religious communities throughout the Christian centuries have made the practice of begging on behalf of the poor an essential component of their religious life. *See* L. Boyle, "Mendicant Orders," 9 *New Catholic Encyclopedia* 648-49 (1967).

In today's culture, this form of charitable solicitation may seem strange or foreign to many members of Christian and Jewish faiths who have become upwardly mobile. The very existence of the buildings in which members of mainline religious bodies gather to worship is palpable evidence that, in one sense, their communities are thriving. Indeed, this material "success" may even make some of these religious adherents reluctant to defend a form of charitable solicitation today that seems foreign to their own practices. But this reluctance has more to do with a loss of memory deriving from socio-economic reasons rather than from theological developments within these communities. And in any event, the sensibilities of the majority are no test of religious truth. *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("Freedom of worship . . . may not be submitted to

vote; [it] depends on the outcome of no election"). Members of minority religions have no less right to practice their faith merely because others recoil from it. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990).

In effect, the Port has prohibited a central religious practice of the Hare Krishna devotees, while exempting a wide variety of secular activities from the strictures of its regulation governing the use of the airport terminal. Begging for almsgiving in public places must be viewed from the only perspective permitted under the First Amendment, that of the religious adherents. Under this view *sankirtan* is utterly vital, an indispensable aspect of their ancient Hindu faith. Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to engage in a religious practice extant among Hindus for nearly 5,000 years, and among Jews, Christians, and Muslims virtually since the founding of these faiths. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 U.S. 1, 71 (1947).

II. RELIGIOUS COMMUNITIES AND THEIR MEMBERS ARE ENTITLED TO AT LEAST AS MUCH PROTECTION IN THE DISTRIBUTION OF RELIGIOUS LITERATURE IN AIRPORTS AS IS ACCORDED TO THE COMMERCIAL AND POLITICAL SPEECH THAT REGULARLY OCCURS IN THESE FACILITIES

The restrictions placed on the distribution of religious literature at the New York and Newark airports by

the Port regulation are not religiously neutral. Although the record in this case does not detail specific instances of overt discrimination, there is a very close fit between the activities prohibited by the regulation and those engaged in by ISKCON devotees, either currently or in the past.[2] On its face, the regulation singles out the very activities for which Krishna devotees are well-known.

There is also an implication that the regulation is readily susceptible of uneven application. The language in the regulation focusing on activity that is "continuous and repetitive," Pet. App. 6, gives to the Port vast discretion to determine what to prohibit. For example, a Port officer might easily look the other way when agents known as "cappers" hawk limousine rides to the City or the suburbs, but come down hard on the Hare Krishnas, and defend the differential treatment by stating that one behavior was "continuous and repetitive" while the other was not. This is the vice of structureless discretion that allows official actors to pursue their personal predilections. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983), citing *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).

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[2] The depositions in this case focused understandably on the legal issues that were then presented, viz., the responsibility of the airlines to allow first amendment activities within the leased areas of the airports. In 1985, Morris Sloane, Deputy Director of the Port Authority, testified that the Port Authority was quite satisfied that the activities of ISKCON devotees were not in any way disruptive of the airport facilities. Sloane Deposition (June 10, 1985), at 75. Until 1988, the Port Authority allowed these activities within the areas of the terminal that were not leased by an airline. JA 63. In that year the airlines were dismissed from the case as a part of a settlement agreement. JA 534.

Thus the primary, if not exclusive, application of the Port's regulation is to the petitioners. As one commentator on *Employment Division v. Smith* has noted, "a law is not neutral if its anti-religious applications are such a major part of the total applications that the anti-religious effect cannot be characterized as 'incidental.'" Douglas Laycock, *The Remnants of Free Exercise* 1990 S.Ct. Rev. 1, 52. Professor Laycock offers an example of a facially neutral ban on the sale of unleavened bread; such a regulation would be invalid not only because the only plausible motive for the regulation is hostility to Jews or to Christians who use unleavened bread in the Eucharist, but also because the anti-religious effect of the regulation would not be incidental since there are virtually no secular uses of unleavened bread. *Id.; see also* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

One need not hunt for a smoking gun pointing at folks in shaved heads or saffron robes in order to smell the foul odor of discrimination in this case. Whether transparent or subtle, the discrimination here falls heavily against a less well-heeled group that has to get its support by going into the public square rather than by hosting elegant fund-raising banquets at the Waldorf Astoria.

As the petition for certiorari illustrates, a wide range of political and commercial discourse occurs at airports. Pet. 19. In actual practice, the Port places no restrictions on this sort of communication. Anyone knows that one can buy all the news that's fit to print (and lots more printed material of lesser quality that is no less protected for that fact) within the confines of the New York airport

terminals. Perhaps because of this very fact, the court of appeals acknowledged that the portion of the Port regulation banning distribution of literature violates the First Amendment. Relying on its interpretation of this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 110 S.Ct. 3115 (1990), it affirmed the district court in that respect. Pet. App. 14-15.

Also purporting to rely on *Kokinda*, a case that did not involve any religious activity protected by the Free Exercise Clause, the court of appeals sustained the portion of the Port regulation banning the religious practices of the petitioners with respect to charitable solicitation. Pet. App. 11-14. The functional effect of this reading of the regulation is to impose a burden "specifically directed at [petitioners'] religious practice," a result deemed unconstitutional in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990). Indeed, the Port's regulation cannot be distinguished from an example given by this Court in *Smith*:

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. The New York prohibition may be contrasted with the Oregon anti-drug law upheld in *Smith*. The Oregon law applied to everyone, and the Supreme Court held that no

exception was required for the Native American Church. Here, there is no regulation of political and commercial speech at the airport, but a special exception was carved out to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature.

It is no answer to say that there may be some non-religious rituals or ceremonies to which the regulation may apply. It would prove too much if the authority attempted to ban all forms of communication at the airport, including the sales of the *New York Times*, the *Wall Street Journal*, and other periodicals now available in the bookstores at the airports. If the Port had written a regulation that purported to ban all First Amendment activity in the airport terminals, that would constitute the substantial overbreadth condemned in *Bd. of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1988). Indeed, the vice of the Port's regulation is that it is more targeted, having been adopted in apparent response to the specific popular resentment of the petitioners' religious activities at the airports. The net effect is that the Port regulation, even as construed by the court of appeals, imposes a burden on religious practices that is not imposed upon other kinds of speakers.

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990). Indeed, even those scholars who have espoused a narrow

interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority. *See, e.g.*, Walter Berns, *The First Amendment and the Future of American Democracy* (1985), and Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978). Locke wrote: "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses." John Locke, "A Letter Concerning Toleration," in 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952). The regulation here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause, and the view of the founders that religious freedom is "an unalienable right." Declaration of Independence, 1 Stat. 1 (1776).

The regulation presents two constitutional problems. First, it implicitly determines the forms of communication in a public place that are protected and those that are not; it is not content-neutral. Neither is the Port neutral with respect to viewpoints; the Port favors majoritarian religious viewpoints over those of minorities by banning *sankirtan* at its facilities, while maintaining a tri-faith chapel at JFK airport, with Mass available at noon each day, and with other services for Protestant Christians and for Jews. To the Hare Krishna devotees, the practice of *sankirtan* is truly necessary, as necessary to them as the Mass is to a Catholic, or as keeping the Sabbath is to an observant Jew (and probably more necessary – at least to them – than various forms of commercial speech permitted in the airports of New York). In this respect, the

regulation is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. 872, 110 S. Ct. at 1603. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. 872, 110 S. Ct. at 1603. The great City of New York allows the dissemination of all sorts of political and commercial messages on the Eastside, the Westside, and all around the town, but the Port restricts the distribution of religious literature by the Hare Krishna devotees at the City's airports. Having set up a series of traditional and non-traditional public fora, the Port may not refuse to extend these fora to those who wish to use them merely on the ground that the content of their message is religious. *See Bd. of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2378 (1990), (Marshall, J., concurring); and *Widmar v. Vincent*, 454 U.S. 263 (1981).

The second constitutional problem is that the asserted purpose of the regulation – reserving the airport facilities for uses consistent with transportation – admits

of exceptions that inevitably yield discriminatory application. The Port in fact allows various forms of communication at the airport, including political and commercial speech, that are just as unrelated to a strict definition of the use of the terminal exclusively for transportation. The impact of its regulation thus falls squarely and discriminatorily on religious adherents such as the petitioners, who alone are in fact required to refrain from "bothering" travelers with their message. Accordingly, the regulation under challenge is constitutionally flawed by virtue of its grave potential for discriminatory application. Only superficially designed to cope with an issue of commerce and transportation, this regulation has in fact been applied to ban a protected religious practice.

If the Port wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the Port might be forced to reconsider how powerful its interests in this matter are if it had to apply the same rules that it applies to the practices of the petitioners to political speeches or fundraising by Presidential candidates or to the commercial speech and transactions concluded by traveling salespersons of the Fortune 500 meeting in the conference facilities operated by the Port Authority. *See* Laurie McGinley, *Airports Try to Ease the Pain of Waiting with New Ways For Flyers to Spend Money*, Wall St. J. (Aug. 21, 1990) at B1. In any event, the Port may not have two standards for regulation of speech, one allowing socially acceptable forms of speech, and another banning the efforts of an unfamiliar and unpopular minority religion to share its convictions with others. *See McDaniel v. Paty*, 435 U.S. 618, 640 (1978)

(Brennan, J., concurring) ("religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally"); and *see Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

The line drawn by the court of appeals is oblivious to its implicit religious discrimination. For that reason the judgment below ignored the Court's teaching that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Bd. of Education*, 330 U.S. 1, 15 (1947). The very fact that the Port's regulation takes aim so squarely at one religious group makes it difficult to escape the reach of these cases.

The district court reached its decision before this Court's decision in *Smith*; the court of appeals ruled after this Court's decision in *Smith*, but did not comment on that case. *Amici* urge this Court to clarify the implication in *Smith* that religious discrimination should not be countenanced where low-level interests such as that asserted here by the Port – the convenience of travelers – are the only justifications offered to defeat a First Amendment claim.

One of the reasons why this Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not

"water[ed] down" but rather "really means what it says." 494 U.S. 872, 110 S. Ct. at 1605. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.*

In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest. *Amici* deny that the government *ever* could have a compelling interest in forbidding for religious purposes an activity it permits for secular purposes. Certainly no such interest was demonstrated here. As the petition ably shows, there are many secular activities that pose the same imagined "threat" to the government's interest that is posed by petitioners' religious activities. As Judge Oakes suggested in his dissent in the court of appeals, one could be jostled in a crowd gathering to hear a speaker on a sidewalk of New York, but that would not justify silencing the speaker; or one could be surrounded by people milling around in a supermarket, but that would not justify burdens on commercial speech of the sort the Port has imposed here. Pet. App. 25. Unless the Port can justify singling out religion for peculiar burdens (and it has not even tried to do so), the regulation must be struck down.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. 110 S.Ct. at 1599. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose

upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

IV. THIS COURT SHOULD REAFFIRM ITS CONDEMNATION OF OFFICIAL HOSTILITY TO RELIGION

Smith clearly marked a major shift in free exercise doctrine. *See* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1120-1128 (1990). One of the departures from the established jurisprudence of the Court was the decision to diminish the independent value previously given to the protection of religious freedom. Instead, the Court construed those cases in which it had ruled for a religious claimant as owing to the presence of another constitutional right in addition to religious freedom. Thus, for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was rationalized because of the parental liberty interest of the Amish in the education of their own children, 110 S. Ct. at 1601.[3]

This hybridization of the inalienable right of religious freedom causes great difficulty for *amici*. We do not view strict scrutiny of governmental rules affecting religious belief and conduct as a "luxury" we cannot afford, *Smith*, 110 S.Ct. at 1605, but as an "essential element of liberty," *id.* at 1616 (Blackmun, J., dissenting). We do not

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[3] This interpretation of *Yoder* turned that decision into a broad victory for all home schoolers, despite strong internal evidence that the Court intended a far more limited result, 406 U.S. at 215-16.

view religious freedom as a sort of constitutional "Hamburger Helper," but as an independent value that is "the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

As with any new formulation of doctrine, the view of religious freedom adopted by the Court in *Smith* is one that requires further reflection by this Court. Whether or not the Court wishes to revisit *Smith* at this time, at the very least it ought not to retreat from the view that "religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *see also Widmar, supra*.

After *Smith*, several governmental agencies have recklessly disregarded the protection that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the local level, zoning laws have been invoked both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. *See, e.g., Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, *app. denied*, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-*Smith* cap on enrollment of students in parochial

school); and *see* R. Gustav Niebuhr, *Here Is The Church*, Wall Street J. (Nov. 20, 1991) at A1. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had a regulation purporting to tell the Amish what to wear when they raise a barn. *See, e.g.*, OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).[4]

The judicial record after *Smith* also betrays a similar insensitivity to religious liberty that may eventually require this Court to reconsider its teaching in *Smith*. For example, in *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring an autopsy was applied to an Orthodox Jew who died in an auto accident, even though this regulation placed a significant burden on a sincerely held religious tenet. This sacrilege was justified by a strikingly unimportant governmental interest (the accuracy of statistics on vehicular accidents), and was manifestly not the least restrictive alternative means of effectuating that low-level governmental interest. In *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990), another district court "regretfully" dismissed on the basis of *Smith* its earlier determination that the government

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[4] This exemption was recently reinstated pending administrative review.

was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of this Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored this Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions. *See Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In *Salvation Army v. Dep't of Community Affairs*, 919 F. 2d 183 (3d Cir. 1990), the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious need to know the identity of the down-and-outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements – which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program – by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep outside on the street than in a building without an elevator. Under *Smith* analysis, however, the bureaucracy wins, and the nuns and the homeless lose. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, New York Times (Sept. 17, 1990) at B1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), overruled in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. *See, e.g.*, Peter Irons, *The Courage of Their Convictions* 22-23 (1988). This Court

could not have intended all of the far-reaching and outrageous results discussed above, whether in the 1940s or in the 1990s. It may be premature for the Court to undertake a review of its teaching in *Smith*, and *amici* note that the Petitioners do not request the Court to do so in this case. But it is not too early for the Court to correct some profound misunderstandings of what this Court actually said in *Smith*. This case is an apt vehicle for the Court to clarify at once that the *Smith* case did not contemplate a casual attitude among the judiciary about religious discrimination. On the contrary, as suggested in Part III above, the *Smith* court taught more emphatically than before that when a statute or ordinance targets a religious practice for hostile treatment – as the Port regulation does – that result can only be justified by a truly compelling governmental interest *in religious discrimination* and by a showing that the governmental burden placed on religion by the regulation is the least restrictive alternative. No such showing was required or made in the courts below.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15, 1789). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the framers could ever have anticipated 200 years ago.

As the nation celebrates the bicentennial of the Bill of Rights, it is time for this Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did here with such ill-

disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
VALPARAISO UNIVERSITY SCHOOL OF LAW
656 South Greenwich Street
Valparaiso, IN 46383
219-464-4233
Counsel of Record

STEVEN T. MCFARLAND
BRADLEY P. JACOB
CENTER FOR LAW AND RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
703-642-1070

THOMAS C. BERG
1642 E. 56th Street, # 1212
Chicago, IL 60637
312-955-1846

Attorneys for Amici Curiae

APPENDIX A

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

Americans United for Separation of Church and State [AU] is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. AU has some fifty thousand individual members of various religious beliefs and some of no religious belief, inclusive of four thousand cooperating religious organizations, with members in all states in the United States, including the State of New York. The organization has been involved in a myriad of cases involving questions of religious liberty, with a number of these reaching the Supreme Court. AU has a vital interest in this case because the issues addressed in this litigation would impact the constitutional freedoms of all religious organizations, not just the Hare Krishna organization.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States, and deals exclusively with issues pertaining to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.,

Inc.; North American Baptist Conference; Progressive North American Baptist Convention, Inc.; Religious Liberty Conference; Seventh Day Baptist General Conference; and Southern Baptists[1] through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to insuring the American people's continued enjoyment of the strong protection afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated

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[1] In addition to its participation in the work of the Baptist Joint Committee, the Southern Baptist Convention now has a special commission, known as the Christian Life Commission, to focus on church-state matters.

the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

Council on Religious Freedom [CRF] is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom. CRF is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries with the full protection of the constitutional guarantees of this nation. CRF speaks to the legal issues raised in this litigation, not because it supports the doctrinal interests of the International Society for Krishna Consciousness but because the loss of freedom for any group represents a loss of freedom for all.

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good

citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins in this brief because it believes that (1) freedom of conscience must include not only the right to believe but also the right to express, advocate, and bear witness to belief; (2) governmental neutrality towards religion is in the best interest of both religion and government, (3) governmental neutrality requires that religious speech be accorded no less protection than other categories of speech.

The National Association of Evangelicals [NAE] was organized in 1942 as a vehicle for united action among evangelical Christians. NAE represents some 43,000 churches from 74 denominations, as well as hundreds of colleges, seminaries, evangelical organizations and thousands of individual members. Through its commissions, affiliates, such as the Evangelical Fellowship of Mission Agencies and National Religious Broadcasters, and through its subsidiary, World Relief Corporation, NAE serves a constituency of more than fifteen million. NAE has frequently testified before Congress and filed many briefs amicus curiae in this Court on matters affecting religious liberty.

The National Council of Churches of Christ in the U.S.A. [NCC] is the cooperative agency of thirty-two Protestant and Eastern Orthodox religious bodies having

an aggregate membership of over 40 million in the United States. It does not purport to speak for all these constituents but for its General Board of some 250 members, made up of the representatives of the member communions in proportion to their size and support of the Council. In furtherance of the policies adopted by the Board over the years supporting religious liberty, the NCC has entered briefs *amicus curiae* in several cases affirming the right of religious groups to disseminate their messages and to solicit support from the public for those messages in places properly opened to the public.

FEB 19 1992

Nos. 91-155 & 91-339

IN THE

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OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondent has refused its consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. Historically, the AFL-CIO and its member unions, have had a vital interest in the First Amendment rights

of citizens to disseminate their views among the public by handbilling and other peaceful means. Indeed, many of the leading cases that this Court has decided in the First Amendment area—including many of the "public forum doctrine" cases—have involved the efforts of union members to engage in peaceful handbilling and other expressive activities. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Because of the AFL-CIO's vital interest in this area, the Federation has filed briefs as an *amicus curiae* in a substantial number of this Court's recent "public forum" cases. *See, e.g., United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

3. Respondent in this case has argued, *inter alia*, that the government, in order to minimize public congestion and annoyance, may broadly prohibit members of the public from engaging in any handbilling activities on a public property other than a street or park, unless the government has purposefully dedicated the property to public expressive activities. Should such a broad argument be accepted by this Court, the ability of citizens to peacefully disseminate their views to the public at large would be severely curtailed. The attached brief *amicus curiae* examines those prior decisions of this Court—and their underlying logic—which have established and defined the right of a citizen to disseminate ideas to fellow citizens on public properties that have traditionally been open for public gathering and free communication. As we show, the bounds of this right are far broader than respondent concedes, and more than broad enough to invalidate the rule at issue in this case.

4. In preparing the attached *amicus curiae* brief, we have consulted with counsel for petitioners to ensure that the views and arguments therein will not merely be repetitive of those presented in petitioners' brief. The AFL-CIO has also requested consent from all parties for the filing of the attached *amicus curiae* brief. Counsel for petitioners has given the AFL-CIO consent. Counsel for respondent initially gave consent; but, after this Court granted a motion by petitioners for an extension of time for the filing of petitioners' brief, counsel for respondents refused consent for the filing of the attached *amicus curiae* brief unless it was filed and served pursuant to the original, unextended schedule.

5. This motion, with the attached brief, is being filed and served within the time allowed by the Court for the filing and service of the brief of petitioners, as provided in the rules of this Court.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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45 Fed. Reg. 70237 (1980) 5
14 C.F.R. §§ 159.93-.94 (1991) 5, 18

MISCELLANEOUS:

T. Emerson, The System of Freedom of Expression (1970) 8
The Declaration of Independence (1776) 8
The Federalist No. 39 (Bantam ed. 1982) 8
Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court Rev. 233 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-155 & 91-339

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Port Authority of New York and New Jersey ("Authority") absolutely prohibits any individual, while present in any of the public interior places of the three major New York metropolitan airports, from distributing to "passers-by in a continuous or repetitive manner" *any "printed or written material" whatsoever.* Appendix to Petition in Case No. 91-155 ("Pet. App.") at 84. The

Authority does *not* provide for any means of obtaining an exception based on a willingness to respect reasonable limits on the time, place, or manner of a proposed distribution, or for any system of permits that would allocate, on a non-discriminatory basis, the opportunity to distribute writings to others in a peaceful and nondisruptive manner.

The Authority's rule thus effectively bans *all* efforts by members of the public to disseminate written ideas among the many millions who pass through these massive and bustling crossroads of national and international commerce. And, the Authority has done so regardless of how compatible and inoffensive any particular distribution would be to its various legitimate interests.

Closing a location that has traditionally served as a place of public gathering and interaction to all literature distribution strikes at the very heart of the First Amendment's fundamental rights of free speech and free press. The decision of the court of appeals holding this anti-distribution rule unconstitutional should be affirmed.[1]

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[1] The Authority also prohibits soliciting funds from "passers-by in a continuous or repetitive manner" in the public interior places of the airports. Pet. App. 84.

The court of appeals upheld this rule reasoning that this Court's recent treatment of a solicitation rule in *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990), justifies prohibitions on face-to-face solicitations that would *not* be justified regarding literature distributions. *See International Society for Krishna Consciousness ("ISKCON") v. Lee*, 925 F.2d 576, 581-82 (2nd Cir. 1992).

Although we believe that the Authority's prohibition of literature distributions and its prohibition of solicitations are both unconstitutional, we will only discuss the prohibition on literature distributions in this brief. We focus on the prohibition of literature distributions because we regard the activity of peacefully disseminating written materials to the public in a place of traditional public gathering as perhaps the purist and most basic exercise of the rights of free speech and free press protected by the First Amendment, and thus the exercise most entitled to public concern and to constitutional protection. See p. 12, *infra*.

The interior air terminal spaces subject to the Authority's absolute ban on literature distributions include many public places entirely open to the public that are frequented by vast numbers of persons from all corners of the nation and the world who shop, spend idle time, and otherwise interact in a generally unstructured and unmonitored manner. As the magistrate below found:

> The airport terminals under Port Authority control are busy places containing large open lobbies and corridors lined with a variety of shops, restaurants, and other businesses. . . . For example, the second-floor lobby of the International Arrivals Building at Kennedy is bordered by two restaurants, two snack bars, a bar, a postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, and two currency exchange facilities; it also contains a dental office and a place for the display of art exhibits. . . . The second-floor corridors are lined by eight duty-free shops, four bars, two snack bars, a bank, two currency exchanges, two bookstores, two newsstands, two cookie/candy shops, four travel insurance areas, a cash/traveler's check machine, and a retail Bloomingdale's; they also contain seating facilities and free-standing advertising displays.
>
> The Port Authority-controlled areas are open to the public at all times. The Port Authority does not deny or monitor the access of the general public to the three airport complexes or to the general-circulation areas in the buildings. . . . Thus, the facilities are freely available to all persons, whether or not they have travel-related tasks. . . . In 1986, the airports served 78,846,000 passengers; this number is expected to increase to 110 million in the 1990s. [Pet. App. 53-54 (internal citations omitted).]

In these respects, the airport terminal areas at issue here are not materially different from those in other major public terminal facilities, all of which have become public gathering places in which citizens freely meet

and exchange information and opinion. And, for decades, every court of appeals that has confronted issues relating to First Amendment activities in such terminals has agreed that these locations are wholly appropriate places for citizens to exercise their First Amendment right to disseminate ideas and written materials to the public.[2]

These numerous and consistent judicial decisions recognize the social fact that the major transportation centers of our society—where millions from varied origins and with diverse destinations freely congregate, sit, shop, rest, eat, and generally intermingle—are places where, for decades, handbilling and other First Amendment activities have been pursued without disruptive, or other deleterious, effect.[3]

The Federal Aviation Administration ("FAA") has likewise recognized that "it has become common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." FAA,

[2] *See, e.g., Jamison v. City of St. Louis*, 828 F.2d 120 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Southwest Africa/ Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) *("Southwest Africa")*; *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 124, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) *("CAMP")*; *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). *See also ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973).

[3] The court below recognized this "unanimous authority" as "well-established" and of "considerable weight," and went on to hold that the Authority's rule banning all literature distributions is unconstitutional, even though the court affirmed the validity of the anti-solicitation provisions contained in the Authority's rules. *See* note 1, *supra*.

Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (1980) ("FAA Notice of Rule"). And, the FAA has, consistent with the unanimous view of the courts of appeals, concluded that, because of "the considerable amount of social and commercial interchange in [airport] terminals," parts of these terminals are "in many respects . . . like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion, and the right of peaceable assembly apply." *Id.* The FAA, in administering its own airports, has, moreover, accepted the reality that handbilling and other First Amendment activities can be carried out without interfering with a major airport's substantial interests, as long as such activities conform to reasonable time, place, and manner restrictions. *Id. See also* 14 C.F.R. §§ 159.93-.94 (1991) (rule establishing time, place, and manner restrictions for handbilling at National and Dulles Airports) ("FAA Rule"); 45 Fed. Reg. 70237 (1980).

In this litigation the Authority has argued that this unanimous and well-established understanding should be rejected in favor of the rule that the government may prohibit *all* distributions of literature within the interior public spaces of air terminals. The Authority contends that areas within public air terminals—whatever their use—are not *intended* to be used for public discourse. *See* Brief of Respondent to Petition for a Writ of Certiorari ("Resp. Br."), at 15. And the Authority adds that this Court's recent precedents have effectively limited the right to disseminate writings on public locations to traditional "streets and parks alone," leaving the government free to totally prohibit such activities *in all other public locations*. *See ISKCON v. Lee*, 721 F.Supp. 572, 577 (S.D.N.Y. 1989) (discussing the Authority's argument that a total ban on airport leafletting is valid because "the scope of the traditional public forum . . . classifica-

tion is a narow one, limited to 'streets and parks' alone, both of which [the Authority] categorizes as a 'unique species of public property' ").

This line of argument denies all generative import to a fundamental premise of our First Amendment law, and would destroy the principled foundation of that law. *See* pp. 21-25, *infra*. Of at least equal consequence, "[a]s society becomes more insular in character," *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013, 5018 (1990) (Kennedy, J.), the Authority's approach would, as a practical matter, severely inhibit "the free flow of ideas and opinions" that is "[a]t the heart of the First Amendment." *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). *See* pp. 26-27, *infra*.

2. In Part I of this brief, we examine the constitutional considerations that led this Court, more than 50 years ago, to uphold a citizen's right to distribute written materials in those public places where the public has traditionally been free to gather and exchange views. Citizens disseminating their ideas among the public in this fashion are participating in the processes of public debate through which the citizenry as a whole formulates its sovereign will to direct the government. *See* pp. 8-9, *infra*. Recognizing this, the decisions of this Court have repeatedly held that when the government holds property open for the free and unstructured use of the gathering public, members of the public have a constitutional right to peacefully engage in such activities as the distribution of handbills. *See* pp. 9-12, *infra* (discussing cases).

More recent cases holding that various forms of public property need not be made available to individuals seeking to use them for expressive purposes have not involved public locations where citizens have been traditionally free to gather and exchange views, but have involved instead

individual demands of access to government properties that have traditionally been devoted only to more specialized, limited, and structured public uses, or to specialized, government-sponsored and managed media of communications. These more recent cases, however, have not questioned the continued vitality of the principle that where public property is held for free public gathering and interchange, the government may not prohibit efforts by members of the public to engage in such activities as handbilling in order to disseminate their views. *See* pp. 12-14, *infra*.

In Part II, we examine the status of the public areas of major air terminals within this framework. As we show, air terminals contain extensive areas designed to replicate the public streets and plazas, to be held continuously open to the public, and to invite the public to gather and engage in free and unstructured use, including, as members of the public see fit, free discourse and the exchange of ideas and views. *See* pp. 14-17, *infra*. On these properties, just as on the streets, handbilling can be—and has been—regularly conducted in a wholly nondisruptive manner. *See* pp. 17-18, *infra*. Moreover, these areas, as places where people with varied origins and destinations congregate and meet, are uniquely valuable for the exchange of information and ideas among the gathering public at large. In essence, transportation terminals connect a locality to the outside world and to outside ideas, and, for this reason, have traditionally been used for extensive communicative activities. *See* pp. 18-19, *infra*. For all these reasons, handbilling has been a normal activity in air terminals for some time. Indeed, the tradition of using air terminal public areas for such communicative activities as handbilling extends over a significant portion of the history of the large, public, commercial air terminal. *See* pp. 19-20, *infra*.

All this being so, the public areas of air terminals are squarely within the free-speech and free-press prin-

ciple that this Court has recognized; *viz.*, that in those public areas where citizens have been traditionally free to gather and exchange views as they wish, such activities as handbilling are constitutionally protected. *See* pp. 20-21, *infra*.

ARGUMENT

1. The Purposes Of The First Amendment And Of The Public Forum Doctrine

A. In evaluating the Port Authority's position in this case, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the purposes of the public forum doctrine particularly.

1. This Court has long recognized that the First Amendment rights of free speech and free press are at the very foundation of our system of government, which is based on the "consent of the governed." *See New York Times v. Sullivan*, 376 U.S. 254, 273-75 (1963).[4] "The consent of the governed" implies not only that consent shall be uncoerced, but also that it shall be informed. Free access to the ideas and views of our fellow citizens is thus essential if our government and our culture are to reflect the free deliberative choices of our citizenry. *See Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); *see also* T. Emerson, The System of Freedom of Expression, at 7 (1970).

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[4] *Cf.* The Federalist No. 39, at 190 (Bantam ed. 1982) (Madison) (defining "republic" as a political system in which all authority is derived "from the great body of the people"); The Declaration of Independence, para. 2 (1776) ("Governments . . . deriv[e] their just powers from the consent of the governed").

The First Amendment, therefore, "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). And, a citizenry denied by the government the *practical* opportunity to freely share information and views, debate, and deliberate is denied "the absolute sovereignty" which our system presumes shall forever rest with "[t]he people, not the government." *New York Times v. Sullivan*, *supra*, 376 U.S. at 274 (*quoting* James Madison's comments on freedom of the press, 4 Elliot's Debates, at 569-70 (1891 ed.)).

The First Amendment rests as well on the premise that the free interchange of ideas is necessary to "secure [for the citizenry] 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times v. Sullivan*, *supra*, 376 U.S. at 266 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)). As this Court recently declared, "[t]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine v. Falwell*, *supra*, 485 U.S. 46, 50-51 (1988) (*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

In the words of Judge Learned Hand, "[t]o many this is, and always will be folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (*quoted in New York Times v. Sullivan*, *supra*, 376 U.S. at 270).

2. These First Amendment principles are the foundation of the line of precedents that treat with a citizen's right to broadly disseminate ideas to the public at large while present on those public locations upon which the public has traditionally gathered. Professor Stone has aptly summarized their point as being that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court. Rev. 233, 245.]

In *Hague v. CIO*, 307 U.S. 496, 501 (1939), this Court held unconstitutional a municipal ordinance which prohibited *inter alia* the distribution of leaflets and pamphlets on "any street or public place." Justice Roberts' plurality opinion rejected the proposition that, because the government owned the public places at issue, the people's ability to engage in such First Amendment activities was "absolutely under the control of the legislature." *Id.* at 515. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 513 (*quoting United States v. Cruikshank*, 92 U.S. 542, 552-53 (1875)). That being so, "communicating thoughts between citizens, and discussing public questions," entailed a "use of the streets and public places [that] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515. As Justice Roberts emphasized, the government's interest in the ownership of the property at issue was not analagous to a private individual's interest in the ownership of his property. Rather, the property at issue was "held in trust for the use of the public." *Id.*

In *Schneider v. State*, 308 U.S. 147 (1939), the Court expanded on the lessons of *Hague* and invalidated a series of municipal ordinances which *inter alia* made it "unlawful for any person . . . to circulate or distribute any . . . circular, hand-bills, cards, posters, dodgers or other printed . . . matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock, or other public place, park, or ground." *Id.* at 155. In rejecting the argument

that such ordinances advance the municipal interest in reducing litter and congestion, the Court stated, "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Id.* at 162:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. [308 U.S. at 161 (footnote omitted).]

Jamison v. Texas, 318 U.S. 413, 416 (1943), once again emphasized the importance of a citizen's right to spread ideas to the public in public places:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communications of ideas by handbills and literature as well as by the spoken word.

And the Court reaffirmed this principle in *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943):

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal means . . . that stringent prohibition can serve no purpose but that

forbidden by the Constitution, the naked restriction of the dissemination of ideas. [*Id.* at 146-147.]

3. The importance of *Hague v. CIO* and its progeny to the health of our system of free expression and self-government cannot be overstated. Put simply, most citizens wishing to participate in the broad public debate do not have access to the privately-owned mass media. For these citizens, effective opportunities to reach their fellow citizens in public places are of the essence.

The right to peacefully distribute handbills in public places in order to disseminate one's views to the public is thus the paradigm of a citizen's exercise of his rights of free speech and free press. *See, e.g., Lovell v. Griffen*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); *Martin v. City of Struthers, supra*, 319 U.S. at 147 ("distribution of circulars is essential to the poorly financed causes of little people"); *see also Ex Parte Jackson*, 96 U.S. 727, 733 (1878) ("Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

B. The constitutional doctrine that the government must permit communicative activities among the public on those public properties where citizens have traditionally been permitted to assemble and engage in free discourse has been repeatedly reaffirmed. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976).

At the same time, however, new issues have arisen regarding the nature and extent of a citizen's right of access to various forms of public property *other than those*

that have been traditionally open to public assembly and the free interchange of ideas. Recent cases have focused on individuals seeking to use specialized, government-established media of communication for distribution of their messages, *see, e.g., Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788 (1985) (federal workplace charity drive); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (internal office mail system); and on individuals seeking access to highly specialized public property which traditionally has not been open to the general public for free gathering and discourse, *see, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (access to military base); *Adderly v. Florida*, 385 U.S. 39 (1966) (access to prison grounds).

As the opinions explain, in these contexts the Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius, supra*, 473 U.S. at 800. In order to weigh those interests, the Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum." *Id.* at 802.

In the first category, the "traditional public forum"—which includes those public places, like streets and parks, where members of the public have been traditionally free to gather and communicate with each other as they see fit—the government's ability to prohibit expressive activity is sharply circumscribed. *Cornelius, supra*, 473 U.S. at 802. Generally, in such places, the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open

ample alternative channels of communications." *Perry*, *supra*, 460 U.S. at 45.[5]

In the second category, the "designated public forum" —which includes those government properties intentionally devoted to the purpose of public debate—the same rules apply. *Perry*, *supra*, 460 U.S. at 45-46.

And, in the third category, the "nonpublic forum," the "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable." *Id.* at 46. Of course, even in this category, "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all surrounding circumstances." *Cornelius*, *supra*, 473 U.S. at 809.

II. The Airport Terminal As A Public Forum

A. As we have already noted, *see* pp. 3-5, *supra*, "an unusual consensus of judicial, legislative and administrative opinion would classify the public areas of [airport terminals] squarely within the public forum family." *Southwest Africa*, *supra*, 708 F.2d at 766. These decisions are the result of repeated and detailed analyses of the structure and functions of modern airport public

[5] As the Court has emphasized, the requirement that "regulations of the time, place, and manner of expression" must be "narrowly tailored to serve a significant government interest" operates to prevent governments from improperly banning expressive activities from the particular public forum locations reasonably chosen by a speaker, *even when the government allows expression at alternative sites. See, e.g., United States v. Grace*, *supra*, 461 U.S. at 180-81 (rejecting argument that prohibition of leafletting on Supreme Court's sidewalk was a reasonable regulation of "place" because leafletting was still permitted on other sidewalks in "the vicinity of the Supreme Court"; specific prohibition at issue must have "sufficient nexus with . . . the public interests . . . urged as its justification"). *See also Schneider*, *supra*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

areas as well as of the traditional and intended uses to which these areas have been put.

In essence, the consensus reflects that the public areas of airports are held for public use in the same way as are streets and parks—*viz.*, for generally unstructured and unmonitored use, so that members of the public are free to sit, walk, wander, meet, congregate, converse, discuss, and debate, as they see fit—and that the communicative activities that members of the public may choose to pursue in these areas do not impede the realization of any valid overriding governmental interest.

First, public terminal areas are functionally and structurally similar to public streets and plazas. These areas typically contain "many of the facilities and services of a fair-sized municipality," (*Southwest Africa*, *supra*, 708 F.2d at 864), including facilities "where air travelers as well as the general public may shop, dine, imbibe, and sightsee" (*Fernandes*, *supra*, 633 F.2d at 627).

The terminals in the present case, for example, contain large plazas for sitting, talking, and waiting, which are lined by cocktail lounges, informational displays, art displays, banking facilities, and a boutique. The public areas of an airport not only appear physically similar to public streets, but like a street, invite the members of the public to spend substantial free and unstructured time, during which they may freely wander, shop, meet others, congregate, converse, debate or pursue whatever other lawful activities they may choose. *See* p. 3, *supra*; *see also* Pet. App. 53-54.

Indeed, the presence of these myriad facilities reflect a conscious effort by the airport authority to replicate, for use by the public in the airport community, the very essence of the diverse and busy public commercial street.[6]

[6] *Compare United States v. Kokinda*, *supra*, 58 L.W. at 5015 (plurality opinion) ("postal sidewalk was constructed solely to assist

Second, as is the case with public streets and parks, the government makes no effort whatsoever to limit who may enter the public airport terminals. These public areas, like the streets and parks, are wholly and continually open to any member of the public who wishes to enter. As with streets and parks, persons need not identify themselves, record their presence, or announce their purposes. *Cf. Fernandes*, *supra*, 663 F.2d at 627 ("The analogy between these terminals concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the . . . passageways. . . ."). Indeed, the general public may enter not only for travel-related reasons, but to use the shops and other facilities of the terminal or to spend idle time in any lawful way. Thus, as with a public street, members of the public have an open invitation to pursue their chosen affairs in these areas.

Third, to the extent the purpose of the public spaces of a modern transportation terminal can be characterized as a specialized one, it is the *same* "specialized" purpose that characterizes public streets; *viz.*, to facilitate movement and transportation. Certainly the movement of people through terminal avenues toward the entrances to airport gate areas is no different an activity than the movement of people through public streets toward subway stations, bus stops, or ferry landings. In this regard, the Second Circuit's earlier discussion of New York's bus terminal is equally relevant here:

> [Passengers] are in the Terminal for the principal purpose of moving to and from other means of . . . transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would

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postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood").

> attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living. [*Wolin*, *supra*, 392 F.2d at 89.]

As *Wolin* so convincingly demonstrates, the terminal plazas and avenues at issue here, though enclosed, serve no function other than that which streets have traditionally served. Certainly the mere presence of a roof cannot make a difference in First Amendment jurisprudence. Covered public streets and commercial districts have existed in many cities for centuries, and exist today in such cities as Minneapolis and Spokane where weather conditions render such enclosures necessary. Meteorology, transportation technology, and public architecture have not heretofore been thought to be the sciences that limit the scope of the First Amendment.

Fourth, an airport terminal shares the characteristics that make expressive activity appropriate to, and compatible with, the myriad other activities that take place on an urban street. Unlike an office or a courthouse, for example, a terminal's normal uses are not those that require silence, privacy, or solitude: its inhabitants are not normally engaged in solemn or reflective activities. *See Wolin*, *supra*, 392 F.2d at 89; *see also CAMP*, *supra*, 508 F.2d at 925. Rather, like a street or a covered downtown marketplace, a terminal is often "attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin*, *supra*, 392 F.2d at 90. And, when such active and stimulating tumult is the natural condition of a public area, there is no realistic need to sup-

press expressive activities such as handbilling in order to assure the area's smooth, uninterrupted operation.[7]

Put simply, the terminal spaces, like city streets, are locations where neutral and reasonable time, place, and manner restrictions on expressive activities can accommodate all substantial competing interests of the government and of the public. There is simply no legitimate need for the government to go further and enact a total prohibition. *Cf.* FAA Rule, *supra* (establishing detailed time, place and manner restrictions on leafletting at Dulles and National Airports); FAA Notice of Rule, *supra*.[8]

Fifth, the public areas of air terminals are by their nature an invaluable location for communicative activities. Like other transportation terminals, air terminals connect a locality to the outside world, and to the outside world's peoples and ideas. Because of this unique attribute of transportation terminal areas, prohibiting expressive activities in such locations has a particularly deleterious effect on the ability of citizens to spread their ideas to those from other regions and to learn from those who wish to spread distant ideas to them.

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[7] We emphasize in this regard that the expressive activities here present no issues of perceived government sponsorship of any particular message or of abdication of government control over its own specialized means of communications. *Compare Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Cornelius*, *supra*; *Perry*, *supra*. As with expressive activities on the streets, all understand that expressive activities in air terminals are wholly private activities engaged in by private citizens who are exercising their First Amendment rights in a public gathering place.

[8] As we have noted, for many years, it has now been the law—as developed by the unanimous holdings of the courts of appeals—that interior airport public places are public fora. This law has not caused any significant problems in the nation's air transit system precisely because reasonable time, place, and manner restrictions, like those that apply to urban streets, can—and indeed do—adequately protect all significant interests, while allowing continued use by the public of these places for communicative activities. *See* pp. 3-5, *supra*.

This attribute of transportation terminals has been recognized—and acted on—throughout our history. For example, whistlestop political speeches at rail terminals have been parts of countless political campaigns and, indeed, have become a part of our political folklore. More recently, "freedom riders" used the facilities of bus terminals to spread the ideas of the civil rights movement throughout the South. And, in contemporary America, we are all familiar with the phenomenon of crowds of well-wishers, protesters, photographers and journalists—and simply the curious—gathering at airports to witness the arrival or departure of a politician, public figure, sports team, or wartime military unit, with the event often accompanied by speeches and rallies, and with free expressions of views among those who attend.

The fact that a transportation terminal connects the people and ideas of a locality with those of the outside world influences communicative activities in the terminal in a more commonplace way as well. A terminal is a place in which people from varied and distant regions—who may have quite different views and backgrounds—may meet freely and communicate ideas. It is precisely this attribute of a terminal—the unique opportunity to reach an audience from a different region with a different message—that has motivated handbillers, for a wide variety of causes, to select the terminal as a location for exercising their rights of free speech and press.[9]

Finally, as the years of cases relating to airport handbilling and solicitation practices reflect, there is in fact

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[9] Handbillers in transportation terminals may often be seeking to communicate with a particular audience that may be far too dispersed or otherwise difficult to reach outside of the terminal. In *Wolin*, for example, the handbiller was seeking to communicate an anti-war message to soldiers who came from outside the New York area, but who passed through the terminal in great numbers. 392 F.2d at 90-91.

a specific and significant tradition of using the public areas of airports and other terminals as places for engaging in public expressive activities. *See* pp. 3-5, *supra*. It is highly relevant in its own right that—*for a significant portion of the history of large urban airports*—many members of the public have indeed used air terminals for precisely the expressive purposes at issue here. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815, n.32 (1984) (referring to the public forum as government property "clearly held in trust, either by tradition *or recent convention*, for the use of citizens at large") (emphasis added). The decisions that we have reviewed above concerning terminal facilities establish that there is *at least* a "recent convention" of the use of such facilities for the specific expressive purpose of handbilling. Moreover, given that the social importance of commercial air travel is itself a relatively recent phenomenon, the extensive tradition of using air terminals as places for this activity of public discourse should carry particular weight.

* * * *

Taken together, the foregoing factors make clear that the public interior areas of air terminals are places where members of the public have traditionally had the full freedom to conduct themselves in the same manner as they are free to do in the public streets and parks. This includes the freedom to meet together in an unstructured and unmonitored manner as free citizens and, as such, to assemble, converse, discuss, and debate whatever subjects they may choose. For these constitutionally weighty reasons, "it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such non-forums as prisons, buses, and military bases." *Southwest Africa*, *supra*, 708 F.2d at 764.[10] It follows, we sub-

[10] *Compare Adderly v. Florida*, 385 U.S. 39 (1967) (prison grounds not public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (inside of public bus is not public forum); *Greer v. Spock*, *supra* (military base is not public forum).

mit that the airport terminals in the present case constitute quintessential public fora and, thus, that the Authority's total ban on the fundamental free speech and free press right to distribute written materials is unconstitutional.[11]

B. The Port Authority has based its argument that air terminals are not traditional public fora on two theories: first, that air terminals are distinct from public fora because the "terminals' purpose is *not* 'public assembly and debate' "; rather "their sole purpose is the facilitation of air travel," Resp. Br. 15; second, that this Court's precedents limit the areas to be classified as traditional public fora to "streets and parks alone" so that no other public areas can qualify. *See ISCKON v. Lee*, *supra*, 721 F. Supp. at 577; Resp. Br. 15 & n.12. Neither of these arguments can withstand reasoned analysis.

1. In considering the Authority's first argument, it is useful to return to the early public forum cases. Those precedents make unmistakably clear that the public forum concept, even at its inception, in no way turned upon whether a particular location was created *for the specific purpose* of facilitating free public debate. Rather, the relevant inquiry is whether the place in question has been held open for unstructured and unmonitored use, which would include free communication among free citizens.

This understanding of the relevant inquiry is evident as early as *Hague*, which emphasized that the public

[11] *Heffron v. ISKCON*, 452 U.S. 640 (1981), is not to the contrary. The question in *Heffron* was not whether the forum in question (a state fairground) was a public forum, but whether the challenged restriction—which confined leafletting and solicitation to assigned booths—constituted a reasonable time, place, and manner regulation in light of the particular nature of the state fair. *See Heffron*, 452 U.S. at 647-48. If the Authority here had only restricted literature distribution to specified areas within the airport terminal, a very different case would be presented.

areas at issue had been places that free citizens traditionally *had used* for gathering together in public and for communicating among themselves according to their wishes, not that these were places created by governments *for the purpose* of facilitating such gatherings or communications. Indeed, *Hague*'s whole point is that such communicative activities are and always have been normal activities in the public lives of free citizens—and for that reason are not subject to government prohibition—not that such activities are to be conducted only at locations to be created by the government for such purposes. As *Hague* put it, the relevant public places "have immemorially been held in trust for the use of the public *and*, time out of mind, *have been used* for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515 (emphasis added).

This is as it must be. As all have recognized, the principal purpose of streets (and airports) is transportation. And this point has been repeated in precisely those cases which have emphasized the right of citizens to use the streets for peaceful expressive activities. *See, e.g., Schneider, supra*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their community's streets open and available for movement of people and property, the primary purpose to which streets are dedicated."); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement.").[12]

The governing rule is that the First Amendment nonetheless requires that the weighty free speech rights of

[12] The public forum cases reaffirming the people's right to use *parks* for the dissemination of ideas have similarly recognized that the primary purpose of parks is recreation, not expression. *See, e.g., Hague, supra*, 307 U.S. at 505 ("there is no competent evidence that the parks of Jersey City are dedicated to any general public purpose other than the recreation of the public").

the people be accommodated in the operation of the streets and parks. *See generally, Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks").

In short, neither streets nor parks are maintained for the principal purpose of providing a place for expression. But this Court has nevertheless repeatedly held that such public areas—*as places where free citizens have been free to gather and communicate*—are public fora.[13]

There is yet another reason why the early public forum cases demonstarate that a location's status as a "traditional public forum" cannot depend on whether it is the government's purpose that the location be a place for expressive activity. In every one of those cases, and in their progeny, the government clearly and unequivocally *denied* having *any* such purpose. It is precisely

[13] Of course, the primary purposes of streets, parks, and other public locations are relevant to the ultimate validity of any time, place, or manner restriction on speech. Even in the most traditional public forum, expressive activity may be limited through neutral, reasonable, and narrowly tailored time, place, and manner regulation:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [*Hague*, 307 U.S. at 515-16.]

The point is that the non-expressive purposes of the public location do not foreclose or determine the public forum inquiry; rather, these purposes are taken into account in the consideration of what regulations of time, place, and manner will be considered reasonable. *See also Schneider, supra*, 308 U.S. at 160-61; *Grayned v. City of Rockford*, 408 U.S. 102, 115-17 (1972); *Heffron, supra*, 452 U.S. at 647-48 & n.10.

because governments have repeatedly *refused* to dedicate public places to public expression—and instead have asserted the right to ban such expression—that this Court has been faced with repeated litigation concerning prohibitions on speech in public places. *See, e.g., United States v. Grace, supra* (ordinance prohibiting handbilling on public sidewalk in front of Supreme Court building); *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (ordinance forbidding expressive activities on public sidewalk adjacent to public school grounds); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana, supra* (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Martin v. City of Struthers, supra* (ordinance prohibiting door-to-door leafletting); *Jamison v. Texas, supra*, 318 U.S. at 415 (ordinance based upon city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas"); *Schneider, supra* (various ordinances prohibiting leafletting in streets, parks, and other public places); *Hague, supra* (same).[14]

2. The Authority's contention that the "traditional public forum" classification is limited to "streets and parks alone" is wholly without merit for a number of reasons.

First, the prior discussions of "traditional public fora" by this Court simply do not support such a conclusion. For example, *Schneider* invalidated a statute which prohibited handbilling on any "street" or "park" as well as on any "*wharf, boat landing, dock or other public place*

[14] In essence, the Authority's insistence that the "traditional public forum" classification apply only to those places purposefully dedicated by the government as places of free expression is, in essence, an insistence that the "traditional public forum" concept and the "dedicated public forum" concept be treated as a single concept. But this Court has recognized that these are *different* concepts. *See, e.g., Cornelius, supra*, 473 U.S. at 802-803; *Perry, supra*, 460 U.S. at 45-46 & n.7.

. . . *or ground*." 308 U.S. at 155 (emphasis added). *Hague* discussed "streets and public *places*." 307 U.S. at 515 (emphasis added). And, later cases have discussed "streets and parks" *as examples* of traditional public fora, rather than as an exclusive list. *See, e.g., Frisby v. Schultz, supra*, 487 U.S. at 480 (street or park is "archetype of a traditional public forum"); *United States v. Grace, supra*, 461 U.S. at 177 (public fora include "'public places' . . . such as streets, sidewalks, and parks"); *Cornelius, supra*, 473 U.S. at 803 (college campus has "many of the characteristics of a traditional public forum"); *Lehman v. City of Shaker Heights, supra*, 418 U.S. at 303 (examples of public fora would include "open spaces, . . . meeting hall, park, street corner, or other public thoroughfare"); *Carey v. Brown, supra*, 447 U.S. at 460 ("streets, sidewalks, parks, and other similar public places"); *Hudgens v. NLRB, supra*, 424 U.S. at 515 (same); *Marsh v. Alabama*, 326 U.S. 501, 504 (1946) ("streets, sidewalks, and public places").

Second, the logic of the public forum cases do not support the Authority's position. As we have explained, these cases do *not* rest on any notion that streets and parks were created by governments as places to be uniquely devoted to public debate. Rather, *Hague* and its progeny rest on the notion that free citizens, whenever they are free to gather in public places of unstructured and unmonitored use, are free as well to conduct the public business of debating public issues. Streets and parks are paradigm examples of such public places, *not* the exclusive examples.

The Authority's assertion that this Court should treat "streets and parks" as the extent of traditional public fora, is nothing less than a call for separating the prior public forum cases from their intellectual foundations and denying those cases all their generative potential. To do this would be to renounce an important aspect of our First Amendment heritage.

Third, to limit the public forum category to traditional streets and parks—as the Authority urges—is likely to have a long-term debilitating effect on the nature of public discourse in our society. Justice Kennedy has warned that "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, *supra*, 58 L.W. at 5018. That warning goes to the heart of this case.

The role played by traditional streets and parks has declined over recent history. As American life has adapted to the automobile, the suburb, and a host of other technological and architectural developments, the normal routines of life have changed. Today, for many of us—perhaps most of us—the casual daily interactions of social life have been removed from the traditional public street and relocated to less traditional, though closely analogous, public locations. If the public forum doctrine is stultified, by treating the doctrine as a historical accident rather than a statement of basic First Amendment principles, then the places for public discourse will grow steadily fewer, and the vitality of our democratic debate will grow steadily weaker.

Given the tragedy that this would represent, the newer locations of public assembly and interchange must be treated as public fora "even though the Government may intend to impose some limitations on the forum's use." *Kokinda*, *supra*, 58 U.W. at 5018 (Kennedy, J.). "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *Id.*

As we have shown, this is a case controlled by the objective considerations that stand behind the public forum doctrine. *See* pp. 15-21, *supra*. As the property is devoted to free and unstructured use of the gathering public, the government must respect the free speech and

free press rights of that public to engage in the public business of free discourse and debate.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be affirmed to the extent that it holds unconstitutional the Authority's rule prohibiting literature distributions.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER LEE, Superintendent of Port Authority Police,

Cross-Petitioner,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Cross-Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION IN SUPPORT OF CROSS-RESPONDENTS

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400
*Counsel of Record
Attorneys for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Nos. 91-155, 91-339

International Society for Krishna Consciousness, Inc., and Brian Rumbaugh, *Petitioners,*

v.

Walter Lee, *Respondent*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THIS CASE[1]

Amicus curiae, the Free Congress Research & Education Foundation, is a non-partisan, non-profit public policy research institute formed in 1977. It is dedicated to advancing traditional values through, among other activities,

[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

(i) education and research on issues of legal and social policy, state policy (including the initiative and referendum process), fiscal responsibility, and institutional reform, and (ii) training in conservative governance and coalition leadership, both in the United States and throughout eastern Europe and the new independent states.

Amicus strongly supports free speech, religious liberty, and free enterprise. Amicus strongly opposes restrictions on speech upon public property such as major airports, and believes that the free exchange of ideas is crucial to effective democratic government and to the betterment of individuals, families, and society.[2]

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[2]Amicus participates in the case to oppose the Port Authority's restrictions on speech upon public property and to promote the free exchange of ideas. Amicus and its counsel are not affiliated with ISKCON in any way, do not endorse ISKCON's religious beliefs in any way, and in fact find ISKCON's religious beliefs distasteful. However, the freedom of speech of all citizens and of ISKCON stand and fall together. As this Court has said,

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943).

SUMMARY OF ARGUMENT

The Second Circuit incorrectly held that the municipal airports in this case are not public fora and that the Port Authority may ban charitable solicitation in the public areas of those airports. (The Second Circuit correctly held that the Port Authority could not ban literature distribution.) The Port Authority's ban of literature distribution and charitable solicitation contravenes a foundational principle of the first amendment: "that the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes's well-known and oft-cited formulation is based on the political and economic philosophy of Milton, Locke, the framers, and J.S. Mill, and wonderfully captures the essence of free speech.

This "marketplace of ideas" should be governed by the same limited-government principles that work best in the market for goods and services. Just as free economic markets perform better than regulated economies, the marketplace of ideas is most likely to produce truth (or at least the best solution to any given problem) with less government interference and more citizen input. Government simply is not competent to control either ideas or economic markets.

Just as government intrusion distorts economic markets, the Port Authority has distorted the marketplace of ideas in this case by attempting to close part of that market. Unfortunately, the Port Authority has chosen to close a mar-

ket/forum that is most accessible to the non-powerful, leaving them at a severe government-imposed disadvantage in the marketplace. ISKCON's alternative fora, if any, are less available (because more expensive) and are less effective.

Finally, both aspects of ISKCON's activities in the New York airports are protected under the first amendment. Literature distribution and charitable solicitation often occur together (often out of economic necessity). The many previous cases decided by this Court reflect that reality and make no distinction between the two activities, but protect them together. The same should be true here.

INTRODUCTION

The economic marketplace works best when it is not distorted by government control and regulation. *The same is true of the "marketplace of ideas,"* and that is a central message of the first amendment's free speech clause.[3]

This nation has applied economic free market principles more consistently than any other, with the result that our nation's standard of living and ability and willingness to

[3]The marketplace of ideas rationale does not extend to obscenity and erotic materials, which are more characterized by nonideational action than speech. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 61, 70-71 (1976) (plurality opinion) (pornographic expression "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). *Accord*, FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); California v. LaRue, 409 U.S. 109, 118 (1972)

help others have been unrivalled for decades. In light of the interconnection of economic liberty and liberty of expression, it is not surprising that this nation also has applied free speech principles more consistently than any other, with the result that our nation's enduring political stability is unrivalled.

The recent collapse of the communist economies simultaneous with the collapse of the communist governments exemplifies the intertwining of economic freedom and freedom of speech. Unprecedented measures of both economic freedom and freedom of speech have come to the former Soviet Union. While it may not be possible to say which freedom came first, it is clear that they came together (and assisted each other's emergence).

In light of this history in our nation and, recently and dramatically, in our world, the Port Authority's effort to exclude ISKCON from the public fora under its control is an anomaly. (It may very well be that the Soviet republics now allow more freedom for literature distribution and charitable solicitation in airports than does the Port Authority.) More to the point for this Court, the Port Authority's policy is an unconstitutional interference with the "marketplace of ideas" protected by the first amendment.

ARGUMENT

I. THE SEARCH FOR TRUTH IN THE "MARKETPLACE OF IDEAS" IS A PRIMARY JUSTIFICATION FOR THE FREEDOM OF SPEECH.

A. The Philosophers Who Influenced the Framing and Interpretation of the First Amendment Emphasized the Great Value of Permitting Free Expression of Competing Ideas.

1. Milton and Locke

"Any examination of the First Amendment . . . requires a preliminary overview of the British tradition." Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition,* 95 Yale L.J. 857, 876 & n.71 (1986). That tradition includes John Milton's argument in 1643 that the search for truth is best accomplished by competition between ideas rather than by government fiat.

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter.

Aeropagitica, A Speech for the Liberty of Unlicensed Printing 227 (C. Eliot ed. 1937).

Following Milton, John Locke further developed what has become known as "classic marketplace theory." Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 Duke L.J. 1, 6 & n.21. Locke argued that truth is discovered through competition with falsehood and that any authoritatively imposed truth is plagued with the danger of error. J. Locke, *A Letter Concerning Toleration,* in *The Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government) and A Letter Concerning Toleration* 125, 139-43 (J. Gough ed. 1966). For Locke, "truth still stood apart, above, to be striven for." Cole, 95 Yale

L.J. at 877. In Locke's words, "let truth have fair play in the world . . . [and] men the liberty to search after it." *An Essay Concerning Human Understanding,* in *The Tradition of Freedom* 285 (M. Mayer ed. 1957).

2. The Framers of the First Amendment

The framers of the first amendment, like John Locke and armed with his philosophy, were convinced of the danger of error in governmentally decreed truth. That conviction led directly to the first amendment's protection of expression.

> From this pervasive state of ignorance, our liberal forefathers deduced three imperatives: (1) No coercion of conscience of one by the other (out of respect for the responsibility of each); (2) *liberty of speech* for everyone so that all may inquire, argue, and persuade; and (3) the development of institutions that nourish practical cooperation in practical activities, without requiring prior agreement about final ends or personal motivations.

M. Novak, *Free Persons and the Common Good* 93 (1989) (emphasis added).

The framers were also convinced that Milton was correct about the outcome of the competition between truth and falsehood: "truth is great and will prevail if left to herself." Act for Establishing Religious Freedom, 12 Hening's Laws of Virginia 84 (1786) (drafted by Thomas Jefferson and proposed by James Madison).

3. John Stuart Mill

J.S. Mill wrote after the framing of the constitution but before this Court considered any cases under the first amendment. His essay, *On Liberty*, expanded on Milton's and Locke's concept of the competition of ideas and has been ech-

oed in this Court's decisions since the turn of the century. *See* T. Emerson, *Toward a General Theory of the First Amendment* 3 n.1 (1967) (Mill's *On Liberty* is one of the "major sources in the development of the theory" of free speech).

Mill argued that government control of speech interferes with the ability to seek truth,[4] and he justified free speech in part because of the aggregate benefits to society, not merely to the individual speaker.

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

J. Mill, *On Liberty of Thought and Discussion*, in *Utilitarianism, Liberty, and Representative Government*, at 24.[5] Courts that invoke the marketplace model of

[4] *See* Ingber, 1989 Duke L.J. at 6:

> [F]irst, if the censored opinion contains truth, its silencing will lessen the chance of our disovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.

[5] Though Mill is often portrayed as anarchically libertarian, that may not be the case.

> [H]owever libertarian the formal application of Mill's principles, his was a highly moralistic libertarianism. . . . The arguments he . . . present[s] are too steeped in a moralistic rationalism to allow the conclusions of our contemporary liberals to be drawn from them with any firmness.

Canavan, *J.S. Mill on Freedom of Expression*, Modern Age, Fall 1979, at 362, 368, 369.

> Mill's defense of the regime of free speech . . . was informed not by an undifferentiated libertarianism but by a vision of the progressive enlightened development of a society. . . . Mill's thinking is not adequately reflected by focusing . . . on a mere absence of restraint. The end is social progress through individual character development.

Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 Sup. Ct. Rev. 158.

In any event, the Court correctly has rejected extreme extensions of Mill's argument for liberty in general, such as an extension to obscenity. *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.14 (1973) (obscenity not protected); California v. LaRue, 409 U.S. 109, 118 (1972) (nonobscene dance on periphery of Constitution).

the first amendment also justify free speech because of its aggregate benefits, and thereby echo Mill. Ingber, 1984 Duke L.J. at 4.

B. This Court Has Relied on the Marketplace of Ideas Rationale More than Any Other.

1. The Earliest Judicial Descriptions of the Marketplace: Justice Holmes

In 1919, Justice Holmes crystallized the political theory of Milton, Locke, the framers, and Mill in one phrase: "free trade in ideas."

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by

> free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).[6] Holmes' rationale of "free trade in ideas" has been described as the classic case for free speech.[7] *E.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 675 (1960).

2. Subsequent Applications by the Court

The search for truth in the marketplace of ideas has been the Court's dominant justification for free speech. *See*

[6]*See* Coase, 6 J. Legal Studies at 1 ("A statement such as this displays an extreme faith in the efficiency of competitive markets and a profound distrust of government regulation.").

[7]Some commentators have pointed out that not everyone agrees that objective truth exists, and have therefore questioned whether the metaphor of a search for truth in the marketplace of ideas retains vitality. *See* Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 965, 974 (1978). Whether or not the end product of the marketplace of ideas is objective truth, however, the process nevertheless yields the best results in an imperfect world. *See* Cole, 95 Yale L.J. at 891 ("[Even i]f we can know the truth only by popular approximation, . . . our concern in protecting speech should not be with truth itself but with the process and results of popular deliberation, i.e., democracy.") *Accord* Ingber, 1984 Duke L.J. at 15 & n.69.

Francione, *Experimentation and the Marketplace Theory of the First Amendment,* 136 U. Pa. L. Rev. 417, 422 & n.13 (1987) ("The marketplace model of the first amendment . . . is the generally accepted judicial choice among first amendment theories."); Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 973 (1978) ("[T]he market theory dominates"). *See also* Chaffee, *Free Speech in the United States* 33 (1967); T. Emerson, *Toward a General Theory of the First Amendment* 3 (1966) ("Maintenance of a system of free expression is necessary . . . as a means of attaining the truth"); G. Gunther, *Constitutional Law* 977 (11th ed. 1985) (Holmes's marketplace rationale for free speech is "among the best known articulations" of first amendment values); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 863-64 (2d ed. 1983) (the development of marketplace theory from John Milton, through J.S. Mill, to Holmes is the "initial justification for a system of free speech"); L. Tribe, *American Constitutional Law* § 12-1 (1978) (the marketplace theory is the "most familiar theory of free speech"); Greenawalt, *Free Speech Justifications,* 89 Colum. L. Rev. 119, 130 (1989) ("The most familiar argument for freedom of speech is that speech promotes the discovery of truth."); Stone, *Content Regulation and the First Amendment,* 25 Wm. & Mary L. Rev. 189, 193 (1983) ("search for truth").[8]

[8]*See also* Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1, 27 (1977) ("The rationale of the First Amendment is that only if an idea is subject to competition

The Court has on occasion cited Mill directly regarding the competition of ideas. *E.g., Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 189 n.25 (1973) (Brennan & Marshall, JJ., dissenting); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 392 n.18 (1969); *New York Times v. Sullivan,* 376 U.S. 254, 272 n.13, 279 n.19 (1964); *Poe v. Ullman,* 367 U.S. 497, 514-15 (1961) (Douglas, J. dissenting); *Barenblatt v. United States,* 360 U.S. 109, 151 n.22 (1959) (Black & Douglas, JJ., and Warren, C.J., dissenting).

The Court has relied on the marketplace of ideas rationale in many cases,[9] including the following: *Texas v. Johnson,* 491 U.S. 397, 417 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole . . . will go unquestioned in the marketplace of ideas."); *Shapero v. Bar Association,* 486 U.S. 466, 481 (1988) (quoting Holmes and referring to "the constitutional fence around this metaphorical marketplace of ideas"); *Hustler Magazine v. Falwell,* 485 U.S. 46, 50, 52 (1988) ("False statements of fact are particularly valueless: they interfere with the truth-seeking function of the marketplace of ideas."); *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) ("unfettered interchange of ideas") (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969) ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee"); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) ("The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.").[10]

[9]As of early 1986, the Court had made 33 references to the "marketplace of ideas" since the first use of that phrase by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (concurring opinion), and had made 14 references to Holmes's phrase "free trade in ideas" since 1925. Cole, 95 Yale L.J. at 894 n.160. Since 1986, the Court has referred to the "marketplace of ideas" an additional three times and to the "free trade in ideas" twice. *See* Texas v. Johnson, 491 U.S. 397, 417 (1989) ("marketplace of ideas"); Shapero v. Bar Association, 486 U.S. 466, 481 (1988) ("marketplace of ideas" and "free trade in ideas"); Hustler Magazine v. Falwell, 485 U.S. 46, 50, 52 (1988) ("marketplace of ideas" and "free trade in ideas").

[10]*See also Dennis v. United States,* 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) ("When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.")

II. THE MARKETPLACE OF IDEAS JUSTIFICATION IS A NATURAL COROLLARY TO THIS COUNTRY'S FREE MARKET ECONOMIC SYSTEM.

A. Free Markets in Economics Produce the Best Results.

The collapse of communist and socialist economies elsewhere in the world has provided additional evidence for the conclusion that most economists had already reached: though not perfect, competition in a free market optimizes production, allocation, and overall utility. As Ingber notes, "Economists have praised the laissez-faire economic model as facilitating optimal production and allocation of goods."[11] 1984 Duke L.J. at 5 n.14 (citing M. Friedman & R. Friedman, *Free To Choose* 1-13 (1980); A. Marshall, *Principles of Economics* 63-70 (8th ed. 1950); A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (7th ed. London 1793) (1st ed. London 1776); D. Ricardo, *Principles of Political Economy and Taxation,* in *The Works of David Ricardo* 1 (J. McCulloch new ed. 1888); Evans & Body, *Introduction* to *Freedom and Stability in the World Economy* 1-2 (D. Evans & R. Body eds. 1976); Furubotn, *Worker Alienation and the Structure of the Firm,* in *Governmental Controls and the Free Market* 195, 216-17 (S. Pejovich ed. 1976); Simon, *The Crucial Issue Is Freedom,* in *Dilemmas Facing the Nation* 1 (H. Prochnow ed. 1979). *See also* Director, 7 J.L. & Econ. at 8 ("The short period of [free market] liberalism has been accompanied by as much material progress as took place in all prior times."); Friedman, *Free Markets and Free Speech,* 10 Harv. J.L. & Pub. Pol'y 1, 7 (1987) ("A free society . . . is a more productive society than any other; it releases the energies of people, enables resources to be used more effectively, and enables people to have a better life."); Ingber, 1984 Duke L.J. at 16 & n.72 ("A free economic market, arguably, values goods and services and allocates resources in a manner that maximizes utility.") (citing K. George & J. Shorey, *The Allocation of Resources* 31 (1978); F. Knight, *The Economic Organization* 32-35 (1951); P. Samuelson, *Economics* 38-42 (11th ed. 1980); H. Simons, *Economic Policy for a Free Society* 46-47 (1948)).

[11] Director provides a working definition of "laissez-faire" that applies equally to the market for goods and the market for ideas: "Laissez-faire has never been more than a slogan in defense of the proposition that *every extension of state activity should be examined under a presumption of error.*" Director, *The Parity of the Economic Market Place,* 7 J. L. & Econ. 1, 2 (1964) (emphasis added).

B. The First Amendment's Marketplace of Ideas is Directly Analogous to Free Markets in Economics.

The marketplace of ideas metaphor has had such power and significance (from Milton, through Locke, through Mill, through Holmes, and to the present) because economic freedom and freedom of speech are in fact interconnected.

> There is a direct connection between free markets on the one hand and free speech on the other. That is part of the story of free markets making free men. Interferences with markets constitute and produce interferences with free speech.

Friedman, 10 Harv. J.L. & Pub. Pol'y, at 3. Thus, there are no examples "of a society that repressed the economic liberties of the individual while being solicitous of his other liberties." I. Kristol, *Two Cheers for Capitalism* xi (1978), quoted in H. Schlossberg, *Idols for Destruction* 120 (1983). *See generally* Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1, 1-5 (1977); Coase, *The Market for Goods and the Market for Ideas,* 64 Am. Econ. Rev. Papers & Proceedings 384 (1974);[12] Director,7 J. L. & Econ. at 3-6.

R.H. Coase explains why the two markets are analogous:

> I do not believe that [a] distinction between the market for goods and the market for ideas is valid. There is no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take into account the same considerations. In all markets, producers have some reasons for being honest and some for being dishonest; consumers have some information but are not fully informed or even able to digest the information they have; regulators commonly wish to do a good job, and though often incompetent and subject to the influence of special interests, they act like this because, like all of us, they are human beings whose strongest motives are not the highest.
>
> . . . My argument is that we should use the same *approach* for all markets when deciding on public policy.

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[12]Coase's articles argue that the same level of skepticism of government competence to regulate markets applies both to the marketplace of ideas and to the economic market. 6 J. Legal Studies at 4; 64 Am. Econ. Rev. Papers & Proceedings at 386, 389.

64 Am. Econ. Rev. Papers & Proceedings at 389. *See also id.* at 390 (advocating "a more consistent view"); Coase, 6 J. Legal Studies at 14 ("It seems to me that the arguments which Emerson uses to support freedom in the market for ideas are equally applicable in the market for goods.").

Director agrees: "[T]here is a remarkable similarity between the underlying basis for complete laissez faire in the market for ideas and the market for economic goods and services." 7 J. L. & Econ. at 3. *See also id.* at 6 (any "dichotomy" between the two markets "is a mistaken one").

In fact, the concept of a free marketplace for ideas preceded its economic counterpart.

> The free market as a desirable method of organizing the intellectual life of the community was urged long before it was advocated as a desirable method of organizing its economic life. The advantage of free exchange of ideas was recognized before that of the voluntary exchange of goods and services in competitive markets.

Director, 7 J.L. & Econ. at 3. Novak emphasizes this in explaining the origins of the metaphor:

> But before this problem arose in economics, it arose with regard to liberty of conscience. To deal with liberty of conscience, the first liberals were driven to a metaphor rooted in village experience: "a marketplace of ideas." Anyone could enter a marketplace; anyone could "sell" or "buy"; anyone could stroll through only to look and listen. In short, a market was a place in which practically everyone entered, a place without coercion, normally a place peaceful, bustling, and lawlike. As the first liberals did not fully trust human intellect (because of their basic maxim of ignorance), so also did they trust it. That is, intellect is never complete, instantaneous, and full; on the other hand, in most persons it is active, reasonably fair, and

> questing. The ignorance of human beings is such that no man should be entrusted with power over the unalienable responsibilities of others. But it is also such that most persons, most of the time (not always), are honest enough inquirers to acquit their own responsibilities. The first principle makes a marketplace of ideas necessary. The second principle makes it work able.

M. Novak, *Free Persons and the Common Good* at 94-5.

Justice Holmes himself shows the concatenation of free enterprise and free speech. While he is often assumed to have been an economic liberal because of his regular affirmance of social welfare legislation, he personally subscribed to free enterprise beliefs. He deprecated "the tendency common to the time to believe in regulating everything--against which I am as prejudiced as you. . . . Many of our friends seem to believe they can regulate bliss."[13] He "never read a socialist yet from Karl Marx down, and I have read a number, that I didn't think talked drool."[14]

III. THE MARKETPLACE OF IDEAS CONCEPTION OF THE FREEDOM OF SPEECH REQUIRES ALLOWING LITERATURE DISTRIBUTION AND

[13] *Holmes-Laski Letters 1916-1935* at 49 (M.Howe ed. 1953). Holmes believed in the right of "winning in the competition of the market." O. Holmes, *Collected Legal Papers* 281 (1920). *Accord, id.* at 280, 293-94; *Justice O.W. Holmes* 197 (H.Shriver ed. 1936); *Holmes-Laski Letters 1916-1935, supra* at 945, 87.

[14] *Holmes-Laski Letters 1916-1935, supra* at 96. *Accord, id.* at 84, 845, 942; 1 *Holmes-Pollock Letters 1874-1932* at 175-76, 124 (M.Howe ed. 1941).

CHARITABLE SOLICITATION IN A MUNICIPAL AIRPORT FORUM.

A. Government Is Not Competent To Control the Marketplace of Ideas, Just as It Is Not Competent To Control Economic Markets.

1. With Ideas, as With Economics, Citizens Know Better than Government what Information They Need To Receive and To Disseminate.

As Justice Scalia recognized recently in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 694 (1988) (concurring opinion), "our traditional understanding, embodied in the First Amendment, [is] that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the Government is wise or impartial enough to make the judgment for them."

Skepticism about government competence in economics dates at least to 1776 and Adam Smith.

> What is the species of domestic industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could be safely trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.

A. Smith, *An Inquiry into the Nature and Causes of the*

Wealth of Nations 456 (R. Campbell, A. Skinner, W. Todd ed. 1979) (reprint ed. 1981).

Government control of ideas presents the same competence problems as government control of markets.

> Free speech issues can be viewed in terms of allocation of institutional competence. In strictly pragmatic terms, the history of official determination of truth has been noted especially for its errors.

Ingber, 1984 Duke L.J. at 7 n.26.[15]

Thus, the marketplace of ideas metaphor is particularly apt.

> The market metaphor introduced by Holmes' "free trade in ideas" concept invokes a laissez-faire conception of the role of government in the regulation of speech. Grounded . . . on the "imperfect knowledge" of participants and overseers alike . . . [h]is "free trade in ideas" concept captures these British theories in a peculiarly American metaphor, suggesting the ideal of the small business economy--free, self-interested participation by individuals and a laissez-faire role for government."

Cole, 95 Yale L.J. at 886.

2. Government Distorts the Marketplace of Ideas When It Closes Forums, and Particularly Low-Cost Avenues of Expression, Such as the Airport Here.

a. Airports and Other Public Fora Are the Most Ac-

[15]Coase is blunt about government incompetence in the marketplace of ideas:

> The government, if it attempted to regulate, would be inefficient and its motives would, in general, be bad, so that even if it were successful in achieving what it wanted to accomplish, the results would be undesirable.

Coase, 64 Am. Econ. Rev. Papers & Proceedings at 384. *See also* Coase, 6 J. Legal Studies at 1.

cessible to the Non-Powerful, and Must Be Kept Available as Public Fora.[16]

In both location and function, large municipal airports are the modern equivalent of ancient city gates. Every prior court of appeals to consider the question concluded that municipal airports are equivalent to streets, parks, and other traditional public fora.[17]

[16]This access argument is specifically limited to *public* property. It has no application to private property, such as shopping centers or malls. The Court quite correctly does not recognize a first amendment right of expression on the premises of privately owned shopping centers. Hudgens v. NLRB, 424 U.S. 507, 519-21 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Court recognizes a first amendment right "to engage in speech activities on private property contrary to the wishes of the owner . . . only if such property consists of a company town or other entity which performs 'the full spectrum of municipal powers and [stands] in the shoes of the State.'" M. Nimmer, *Nimmer of Freedom of Speech* § 4.09[D] at 4-114 (1984) (quoting Lloyd Corp., 407 U.S. at 569). The Court has authorized states under their own constitutions to offer more expansive rights. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). However, it has been suggested that the Court's subsequent takings clause cases have made it doubtful that state constitutional rights such as those found in PruneYard can continue to be upheld. Note *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?,* 64 Wash. L. Rev. 133 (1989).

[17]*See* Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied,* 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds,* 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975).

In part because they are public fora, municipal airports are accessible to speakers who may not have effective access to any other platform. In this modern world, only "two methods exist for communicating nonsanctioned views to the public: the mass communication media for those with access, and the public forum for those without such media access." Ingber, 1984 Duke L.J. at 37. Thus, the same streets, parks, and other similar places that "have immemorially been held in trust for the use of the public," *Hague v. CIO,* 307 U.S. 496, 515 (1939), often are the only fora of any type accessible to many citizens.

> These alternative forums for public communication [streets, parks, and open places] enable dissenting or low status individuals and groups to disseminate their views even when they cannot gain access to mass media.

Ingber, 1984 Duke L.J. at 41. *See also id.* at 5 (recognizing the existence of "access limitations suffered by disfavored or impoverished groups").

Professor Kalven recognized the unique value of public places as public fora when this Court had just begun its public forum analysis:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 12.

Justice Kennedy reiterated the same concern in the Court's most recent public forum decision:

> As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.

United States v. Kokinda, 110 S. Ct. 3115, 3125 (1990) (concurring opinion).

This Court's cases repeatedly have stressed the economic need for access to public fora. *E.g., Martin,* 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *Murdock v. Pennsylvania,* 319 U.S. 105, 112 (1943) ("Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy [by a license tax on colporteurs]. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.").[18]

b. The Government Cannot Divert Speakers to Alternative Fora Because the Alternatives Are Not as Effective And Do Not Reach the Same Audience.

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[18]This is not to say that government has any affirmative obligation to remove access limitations that it has not erected, but only that government should not impose additional access limitations on the only forums to which disfavored or impoverished groups still have access. The government violates free speech (and other) rights when it attempts to act as a "leveler" of society, attempting to impose equality of results rather than merely ensuring equality of opportunity. *Buckley,* 424 U.S. at 17 (portions of FECA unconstitutional; provisions "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes" necessarily involved "suppressing communication"). *See also* Novak, *Free Persons and the Common Good* at 97 ("Liberals [referring to early or classical liberals] were not often levellers.").

That alternative fora may be available to a given speaker cannot justify excluding that speaker altogether from the forum in question.

> [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State, 308 U.S. 141, 163 (1939).

> Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . ." Free expression "must not, in the guise of regulation, be abridged or denied."

Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (quoting *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968), and *Hague v. CIO*, 307 U.S. 496, 516 (1939)). For example, in *Heffron v. International Society for Krishna Consiousness*, 452 U.S. 640 (1981), charitable solicitation and literature distribution could legitimately be confined to a fixed location within the fairgrounds, but could not be excluded from the fairgrounds altogether. *Id.* at 655.

Nor does the Court simply accept without examination the government's assertion that alternative fora are available. Alternative fora may be available theoretically, but not realistically.

> [T]he Court expressly should evaluate the feasibility of the proposed alternatives. The Court should require that a given speaker have available realistic alternatives to disseminate *effectively his* particular message.

> . . . The fact that the media may only be used at great expense, and in contrast to traditional forums, has recognized power to exercise prior restraint on what it will disseminate, would seem to mandate greater, rather than lesser, protection of the traditionally low cost open forums, if for no other reason than to preserve a situs for voices otherwise lost in the wilderness.

Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 Hastings L.J. 439, 481, 486 (1986) (original emphasis). Furthermore, access to more than one forum may be more of a necessity than a luxury.

> We seldom recognize the enormous importance of *diversified* sources of financial and economic support in making it possible for a "nut" to have his say. . . . [T]oday's nut may be tomorrow's prophet. The essence of free speech is to preserve the opportunity for nuts to turn into prophets.

Friedman, *The Economics of Free Speech*, in *The Essence of Friedman* 9, 10 (K. Leube ed. 1987) (emphasis added).

c. Distortion Results from Closing Accessible Public Fora Such as Airports.

The marketplace of ideas, like the economic marketplace, operates best when the government does not suppress information or, worse, close portions of the marketplace altogether.

> The suppression of relevant information in the political market [and in the marketplace of ideas in general], as in the market for (ordinary) goods and services, may distort choice and in that way reduce welfare. . . .
>
> . . . There will be less experimentation if the financial rewards are systematically reduced because of suppression. . . . New ideas may never get a hearing.
>
> . . . [T]he loss of information from a refusal to

> provide public forums[] is slight *unless* the government goes so far as to forbid the use of its streets, sidewalks, and parks [and airports].

Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U.L. Rev. 1, 11, 24, 52 (1986) (emphasis added).

In this case, the Port Authority's threatened closure of a unique and critical portion of the marketplace of ideas will necessarily distort the overall marketplace.

B. Both Literature Distribution and Solicitation Are Protected Speech.

1. Distribution Is Protected.

As this Court has previously held, "the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment." *Heffron*, 452 U.S. at 647 (citing *Schneider v. State*, 308 U.S. 147, 160, 162-164 (1939), and *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)). *See also Martin*, 319 U.S. 141; *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943). *Accord Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

2. Solicitation Is Also Protected.

a. Solicitation Is Speech.

"Solicitation is a recognized form of speech protected by the First Amendment." *Kokinda*, 110 S. Ct. at 3119 (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980), and *Riley*, 487 U.S. at 788-89). *See also Riley*, 487 U.S. at 693 (Scalia, J., concurring) ("We have held the solicitation of money by charities to be fully protected as the dissemination of ideas.").

In *Heffron*, 452 U.S. at 647, the Court emphasized that the first amendment protects solicitation as well as literature distribution:

> Nor does [the state] claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith. Our cases indicate as much. *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The Court has more than once expounded the following reasons that solicitation is protected speech:

> "[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease."
>
> . . . "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment."

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797-98 (1985) (quoting *Schaumburg*, 444 U.S. at 632).

b. Freedom To Solicit Is Necessary to the Freedom To Disseminate.

Charitable solicitation is both an economic and a constitutional necessity.

> We seldom recognize the enormous importance of diversified sources of financial and economic support in making it possible for a "nut" to have his say. . . . [T]oday's nut may be tomorrow's prophet. The essence of free speech is to preserve the opportunity for nuts to turn into prophets.

Friedman, *The Economics of Free Speech*, at 10.

That explains the Court's recognition in Cornelius that literature distribution is not possible without solicitation, and that solicitation must therefore be protected. "[W]ithout solicitation the flow of such information and advocacy would likely cease." *Cornelius*, 473 U.S. at 798 (quoting *Schaumburg*, 444 U.S. at 632). "[W]ithout the funds obtained from solicitation in various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized." *Cornelius*, 473 U.S. at 799.[19]

c. Solicitation May Be More Time Consuming for the Audience, but It Is Also a More Effective Mode of Communication.

As the Court recognized in *Cornelius*, "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available in [written solicitation]." 473 U.S. at 798. In-person advocacy, including solicitation, should therefore be no less protected than silent literature distribution.

> The audience's experience in a face-to-face encounter is more imposing than when it passively reads about or

[19] *Cf. Lovell*, 303 U.S. at 452 ("Liberty of circulating is as essential to [the freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

> listens to a viewpoint. The interchange is more flexible, more of the senses are engaged, and the audience's response, whether negative or positive, is likely to be more pronounced.

Ingber, 1984 Duke L.J. at 41.

d. Solicitation in the Airport Is Analogous to Door-to-Door Solicitation, which the Court Has Recognized Is Entitled to Special Solicitude Because It Is Inexpensive.

Door-to-door solicitation is often used by individuals and groups whose messages have not attracted large amounts of funding, because door-to-door solicitation is inexpensive. For those individuals and groups, without door-to-door solicitation "the flow of [much] information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *See also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812-13 n.30 (1984) ("the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry").[20]

[20] The Court went on to note that "this solicitude has practical boundaries," quoting Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . ., is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

Here, ISKCON does not seek to use sound trucks or anything remotely similar, and no easy means of publicity are open in the airport forum under the Port Authority's rules.

CONCLUSION

The market for goods and the marketplace of ideas should both be free of government interference. That interference distorts and defeats the optimum results the markets would otherwise achieve if they were controlled only by the producers and consumers, who best know their own needs and interests. The Port Authority's attempt to close a portion of the marketplace of ideas in this case violates the first amendment's embodiment of free market principles.

For the foregoing reasons, amicus respectfully urges this Court to affirm in part and to reverse in part the judgment of the U.S. Court of Appeals for the Second Circuit in this case.

Date: February 14, 1992.

Respectfully submitted.

WENDELL R. BIRD*
DAVID J. MYERS
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

(14) (14)

Nos. 91-155 & 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,
vs.

WALTER LEE, Superintendent of Port Authority Police,
Respondent and Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
JEANNE M. ANDRACHEK
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTION PRESENTED

May the solicitation and receipt of contributions be prohibited from the public concourses of airports?

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WALTER LEE, Superintendent of Port Authority Police,
Respondent and Cross-Petitioner.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation on behalf of victims of crime and the law-abiding public.

In Question 3 of the Petition for Writ of Certiorari, petitioner states the issue as involving "speech that, at worst, might cause [travelers] momentary delay." In reality, the worst is *far* worse. The *conduct* which petitioners seek to engage in concurrently with their speech creates a situation fraught with potential for fraud, duress, and victimization of the helpless. These concerns are not based on idle speculation. They are based on the judicial-

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1. CJLF has received written consent of the parties to file this brief.

ly determined facts from prior litigation involving the petitioner.

The cumbersome machinery of the criminal justice system is suited for dealing with major crime. It is dismally ineffective in dealing with the widespread petty crime that plagues our society today. Such crime is a major factor in the growing, malignant cancer of decay and disorder. See generally Leo, *Fighting for Our Public Spaces*, U. S. News & World Report, Feb. 3, 1992, at 18; Wilson and Kelling, *Making Neighborhoods Safe*, Atlantic Monthly, Feb. 1989, at 46; Wilson and Kelling, *Broken Windows: The Police and Neighborhood Safety*, Atlantic Monthly, March 1982, at 29.

A decision that government is powerless to regulate in-person solicitation for the immediate payment of money would be detrimental to the rights of law-abiding persons which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

Petitioner, the International Society for Krishna Consciousness, Inc. ("Krishna Society"), seeks to engage in activities it calls *sankirtan* in the major New York airports. Those airports are operated by the Port Authority of New York and New Jersey. Respondent is the late Walter Lee, who was superintendent of police for the Port Authority. As of this writing a new superintendent has not yet been substituted as a party.

Sankirtan "consists of 'going into public places, disseminating religious literature and soliciting funds to support the religion.' While the distribution or sale of religious literature is a major part of the ritual, its primary purpose appears to be fundraising." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F. 2d 576, 577 (CA2 1991). The Krishna Society and *sankirtan* are

described in detail in *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147, 151-154 (N.D.N.Y. 1980), rev'd on other grounds, 650 F. 2d 430 (CA2 1981). *Barber* notes that while *sankirtan* traditionally depended on "true speech and gentle speech," the theory and practice in the modern American branch of the religion are dramatically different. See 506 F. Supp., at 152-153.

The Port Authority promulgated a regulation forbidding both "sale or distribution of . . . written material" and the "solicitation and receipt of funds" inside the airport "if conducted by a person to or with passers-by in a continuous or repetitive manner." 925 F. 2d, at 578-579. The Port Authority does not seek to limit either activity on the sidewalk outside the airport. *Id.*, at 578, n. 2. The District Court struck down the regulation as to both the literature distribution and the solicitation limits.

The Court of Appeals reversed in part, upholding the ban on solicitation. The majority found the case indistinguishable from *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990), where this Court upheld a similar ban on post office property. 925 F. 2d, at 582. However, the Court of Appeals affirmed the judgment insofar as it struck down the ban on distribution of literature. *Ibid.*

On the petition for certiorari, case 91-155, the Krishna Society seeks to strike down the solicitation regulation. On the cross-petition, case 91-339, the Port Authority seeks to reinstate the literature distribution regulation. In this Brief *Amicus Curiae*, CJLF will only address the solicitation issue in the petition, *i.e.* case 91-155.

SUMMARY OF ARGUMENT

The concurring opinion in *United States* v. *Kokinda* stated that the government could prohibit personal

solicitation for immediate payment of money in the circumstances of that case, regardless of whether the location was a public forum. Whether this is correct is an important question that needs to be answered. The Court should therefore address the solicitation issue first. The public forum question can and should be addressed to resolve the literature distribution question raised by the cross-petition.

The statement that solicitation for a religious cause is "fully protected speech" is an oversimplification. A careful analysis of precedents reveals that this sweeping generalization is subject to important qualifications. First, receipt of money or subscriptions is conduct, subject to regulation. Second, solicitation is subject to reasonable time, place, and manner restrictions, the same as any other speech.

The government has a substantial interest in regulating personal solicitation for immediate payment. Past cases show that such solicitation creates a situation fraught with potential for fraud, duress, and thievery, beyond the ability of the criminal law to effectively check.

The solicitation regulation deals with the manner of combined speech and conduct. It is valid if it passes either the *O'Brien* test or the time, place, and manner test. It passes both. It is nondiscriminatory, content-neutral, and leaves open ample alternatives for conveying the Krishna Society's message.

ARGUMENT

I. The Court should address the solicitation question before the public forum question.

United States v. *Kokinda*, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) upheld a ban on solicitation on the grounds of a post office without a clear resolution of the question

of whether the grounds were a public forum. The *Kokinda* plurality based its decision on the conclusion that the post office and its grounds were a non-public forum. 111 L. Ed. 2d, at 584, 110 S. Ct., at 3121. However, the fifth vote was based on the assertion that "personal solicitation on postal property for the immediate payment of money" can be prohibited as a time, place, and manner restriction, regardless of whether the property is a public forum. 111 L. Ed. 2d, at 589, 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment).

Amicus CJLF respectfully submits that the Court should address Justice Kennedy's position in *Kokinda* first. The Court can then proceed to the public forum issue to answer the literature distribution question raised by the cross-petition. This case presents an opportunity to clear up a half century of rampant confusion regarding solicitation, and that opportunity should be not be passed up.

In 1943, this Court decided a trilogy of cases involving the activities of Jehovah's Witnesses. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Douglas* v. *Jeannette*, 319 U. S. 157. Justice Jackson, joined by Justice Frankfurter, wrote an opinion in *Douglas* concurring in the result in that case and dissenting in *Murdock* and *Martin*. After reviewing the record of the Witnesses' practices and the Court's decisions in *Murdock* and *Martin*, he notes that "both opinions suggest that there are evils in this conduct that a municipality may do something about. But neither identifies it, nor lays down any workable guide in so doing." 319 U. S., at 177.

Such a workable guide is necessary, Justice Jackson concludes. "[W]e must do our utmost to make clear and easily understandable the reason for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition. ¶I think the majority has failed in this duty." *Id.*, at 182.

Justice Jackson's warning proved correct. The field remains confused. In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), the authors of *Murdock* and *Martin* stated that those cases had been overruled. *Id.*, at 649-650 (Black, J., dissenting, joined by Douglas, J.). *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980) said they had not. In *Riley* v. *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 796 (1988), the majority proclaims broadly that solicitation is "fully protected speech." Yet in *Kokinda*, *supra*, the plurality implies and the concurrence holds that personal solicitation for immediate payment is subject to substantially greater regulation than pure advocacy of ideas.

As we will show in detail below, bans on solicitation in general are different from prohibitions of the kind of face-to-face solicitation for immediate payment of money engaged in by the Krishna Society. Yet the lack of clear, unequivocal authority for the distinction causes confusion. Some district courts have applied broad language in some of the cases to contexts far removed from the kinds of activities involved in those cases. See, *e.g.*, *Young* v. *New York City Transit Auth.*, 729 F. Supp. 341, 345 (S.D.N.Y. 1990), rev'd, 903 F. 2d 146 (CA2 1990), cert. denied, 111 L. Ed. 2d 516, 111 S. Ct. 516 (panhandling in subway); *Blair* v. *Shanahan*, 775 F. Supp. 1315, 1318 (N.D. Cal. 1991) (panhandlers accosting people on streets).

To clear up this confusion, therefore, *amicus* respectfully requests that this Court address the question of whether a state can prohibit the personal solicitation for immediate payment of money, regardless of whether the place of solicitation is a public forum.

II. Solicitation is not exempt from regulation.

"Our prior cases teach that the solicitation of charitable contributions is protected speech," the majority stated in *Riley* v. *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 789 (1988). Like many sweeping characterizations, this one glosses over subtle but important distinctions. "By their very vastness, the themes to be translated into law lend themselves too readily to the innocent deceptions of rhetoric." *Poulos* v. *New Hampshire*, 345 U. S. 395, 415 (1953) (Frankfurter, J., concurring in the result).

The word "solicitation" sweeps in a wide variety of speech and conduct. Whether a particular form of solicitation is protected is a question which cannot be answered simply by pigeonholing it as "charitable solicitation." The statement "Give to my widows' and orphans' fund or I'll bash your face in" is not protected speech.

Schaumburg v. *Citizens for a Better Environment*, 444 U. S. 620 (1980) is the case normally cited for the proposition that charitable solicitation is fully protected. *Schaumburg* is based on a discussion of a long line of cases. See *id.*, at 628-632. These cases do indeed support the *Schaumburg* decision, but they do not support the more extravagant extrapolations that have been made from that decision. A review of these cases is necessary.

A. Pre-Schaumburg Cases.

In *Schneider* v. *State*, 308 U. S. 147 (1939),[2] the Court struck down an ordinance requiring a permit for any house-to-house canvassing. In that case, the Jehovah's Witnesses went house to house, distributing literature and showing a card which asked for a small contribution to support the distribution effort. *Id.*, at 158. The ordinance made no distinction between solicitation and distribution of literature. *Id.*, at 157. "It bans unlicensed *communication* of any views or the *advocacy* of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what litera-

2. Sometimes cited as *Schneider* v. *Irvington*.

ture may be distributed from house to house and who may distribute it." *Id.*, at 163 (emphasis added).

The ordinance was struck down under *Lovell* v. *Griffin*, 303 U. S. 444 (1938), which had invalidated a sweeping ban on all literature distribution. 308 U. S., at 164. The censorship potential of the ordinance, permitting some to solicit while others were banned, was particularly obnoxious. *Ibid.* The Court was careful to note, however, that "reasonable hours" and "other features of such activities . . . may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." *Id.*, at 165. *Schneider* does not stand for the proposition that in-person solicitation and receipt of money cannot be prohibited. That aspect of Schneider's conduct was not the basis of the permit requirement.

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) is another prior restraint case, involving a license requirement for solicitation.[3] The statute empowered state officials to decide which causes were "bona fide object[s] of charity" and which were not. Only the approved charities received the required certificate. *Id.*, at 302.

This power of censorship vested in state officials rendered the statute unconstitutional. *Id.*, at 305. The *Cantwell* Court was careful to note, however, that solicitation for religious causes was not exempt from "general and non-discriminatory legislation." *Id.*, at 304. "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose." *Id.*, at 305.

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3. *Cantwell* is more famous for its holding reversing defendant's other conviction for breach of the peace. The latter conviction involves the degree to which we must tolerate intolerant expression, an issue before this Court in *In re R. A. V.*, No. 90-7675.

In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), a license requirement for holding a parade was upheld. The state court had construed the statute to require the authorities to issue the license conditioned only on reasonable time, place, and manner restrictions. *Id.*, at 575-576. Cases involving blanket bans on expression or vesting standardless discretion in the licensing officials were distinguished. *Id.*, at 577-578.

Jamison v. *Texas*, 318 U. S. 413 (1943) involved distribution of handbills. The handbills publicized a meeting to be held later and also included an offer to deliver books in return for a small donation. Jamison distributed her handbills in an orderly and quiet manner. The books were not sold on the street, but would have been delivered later. The books cost Jamison more than the donation she requested. *Id.*, at 414-415.

The ordinance was struck down on the authority of *Lovell*, *Schneider*, and *Cantwell*. Jamison's "clearly religious activity" could not be prohibited "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." *Id.*, at 417.

The *Jamison* Court appears to have been convinced that the defendant was engaged primarily in communicating ideas, and that the fund-raising aspect of her activity was merely incidental. The same is true of the case which comes closest to supporting the Krishna Society's position: *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

Murdock involved a flat license tax on solicitation for orders for goods of any kind. *Id.*, at 106. The defendants were, once again, Jehovah's Witnesses distributing their literature. Whether they were selling it or merely giving it away and requesting donations was unclear. See *id.*, at 107. Justice Douglas, writing for the Court, begins with a

long song of praise for the "colporteur,"[4] but then defines the "single issue" narrowly: "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." *Id.*, at 110.

Murdock then distinguishes religious activity from "purely commercial." *Ibid.* In doing so, the Court takes pains to stress that the fund-raising portion of the activity was merely collateral, and that preaching and publicizing the doctrine was the main object. *Id.*, at 112.

It is clear from the discussion in *Murdock* that the "purely commercial" does not include the press. The fact that Thomas Paine's pamphlets were sold is cited to support the argument that sale does not equal "purely commercial" activity. *Id.*, at 111. Freedom of speech, press, and religion are cited together as not being limited "to those who can pay their own way." *Ibid.* Religious groups and the press are again mentioned together as not being free from all taxation. *Id.*, at 112.

The *Murdock* holding is, therefore, not based on any distinction between soliciting donations for religious causes and selling newspapers. It is instead based on the oppressive nature of the flat license tax. Even after going to considerable lengths to characterize the activity as non-commercial, *Murdock* relies on Commerce Clause precedent for the onerous nature of this tax. See *id.*, at 113.

The heart of *Murdock* is this: The tax "is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties *of press* and religion and inevitably tends to suppress their exercise." *Id.*, at 114 (emphasis

4. "A peddler of devotional literature." *American Heritage Dictionary* 294 (2d Coll. ed. 1985).

added). Read broadly, this passage may be taken to mean that there is a constitutional right to solicit in person for the immediate sale of printed matter or for a donation for a religious cause. If that is what *Murdock* means, it has long since been overruled, as we will show below. Read narrowly, *Murdock* simply means that the flat license tax is an oppressive burden on religion and the press, just as it is on interstate commerce. If that is what *Murdock* means, it is still good law, but it has no application to this case.

Martin v. *Struthers*, 319 U. S. 141 (1943), yet another Jehovah's Witnesses case, was decided the same day as *Murdock*. The ordinance in question prohibited persons distributing literature door to door from ringing the doorbell or knocking. *Id.*, at 142. Citing *Lovell*, *Schneider*, and *Cantwell*, the Court struck down this ordinance as a violation of freedom of speech and press, not religion. *Id.*, at 143.

Thomas v. *Collins*, 323 U. S. 516 (1945) indicated that the issue of solicitation as distinct from pure advocacy remained open, despite the broad language of *Murdock*. In *Thomas*, a labor union leader gave a speech in Texas without the required organizer's card for labor solicitation. He invited the crowd generally to join the union and also singled out one member of the audience for an individual appeal to join. *Id.*, at 522-523.

The Court decided in favor of the labor leader. However, it took pains to note that he did not receive or solicit any funds, *id.*, at 525, and that under the procedural posture of the case the solicitation of the individual could not be separately considered, *id.*, at 528.

A permit cannot be required of one who seeks to make a speech "to rally support for any social, business, religious or political cause." *Id.*, at 540. "Once the speaker goes further, however, and engages in *conduct* which amounts to more than the right of free discussion

comprehends, *as when he undertakes the collection of funds* or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed." *Ibid.* (emphasis added). Conduct is different from speech, and collection of funds is conduct.

This brings us to *Breard* v. *Alexandria*, 341 U. S. 622 (1951). *Breard*, like the present case, involved a flat prohibition on in-person solicitation. The ordinance in *Breard* prohibited door-to-door sales or solicitation of orders. *Id.*, at 624-625.[5] After rejecting due process and interstate commerce challenges, *id.*, at 629-641, the Court turned to the First Amendment question.

Breard was in the business of selling magazine subscriptions. *Id.*, at 624. Therefore, he had a First Amendment argument. "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." *Id.*, at 641. Breard was in the same category as the Jehovah's Witnesses and different from the Fuller Brush Company. The Court agreed "that the fact that periodicals are sold does not put them beyond the protection of the First Amendment." *Id.*, at 642. However, the selling "brings into the transaction a commercial feature." *Ibid.*

Breard is consistent with a narrow reading of *Murdock*, but not a broad reading. *Murdock* had held that the Witnesses' activities were not rendered *purely* commercial by the fact that the literature was sold, 319 U. S., at 111, but recognized "that religious groups and the press are [not] free from all financial burdens of government," *id.*, at 112. *Breard* similarly recognizes that publications are still entitled to First Amendment protection, even though they are sold for a profit, but that the protection is not

5. Such enactments are commonly called "Green River" ordinances after *Green River* v. *Fuller Brush Co.*, 65 F. 2d 112 (CA10 1933) and *Green River* v. *Bunger*, 58 P. 2d 456 (Wyo. 1936), appeal dismissed for want of a federal question, 300 U. S. 638 (1937).

absolute. The rights of others must be considered. 341 U. S., at 642. In each case, the Court approaches the activity in question as a protected First Amendment activity, but with a commercial aspect to it which subjects it to *reasonable* regulation and taxation. Compare *Murdock*, *supra*, 319 U. S., at 114 ("It [the tax] is in no way apportioned.") with *Swaggart Ministries* v. *Cal. Bd. of Equalization*, 493 U. S. 378, 389 (1990) (percentage sales tax on Bibles, etc., constitutional); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 21 (1989) (plurality) ("unnecessary sweeping statements in *Murdock*" disavowed).

Breard is not distinguishable from *Murdock* on the ground that subscription magazines are different from charitable donations in any way relevant to the First Amendment question. As discussed above, the rationale *Murdock* itself precludes such a distinction. The cases are distinguishable in that the regulation in *Breard* was deemed reasonable, notwithstanding the protected status of the publications, while the tax in *Murdock* was not. See *Texas Monthly*, *supra*, 489 U. S., at 23, n. 10. If *Murdock* is read more broadly to create a right to solicit free of reasonable regulation or taxation, then it is to that extent overruled by *Breard*, *Texas Monthly*, and *Swaggart*.

Breard distinguishes *Martin* v. *Struthers* by emphasizing that *Martin* involved only the *free* distribution of literature. *Breard*, 341 U. S., at 642-643. Yet *Martin* was decided the same day as *Murdock*, and *Murdock* saw no significant difference between the sale of a publication and the distribution combined with solicitation of a donation. See 319 U. S., at 111. The difference between *Breard* and *Martin* is the *manner* of solicitation. Martin simply left leaflets with people advising them of a meeting. 319 U. S., at 142. Breard employed "possibly persistent solicitor[s]," 341 U. S., at 644, who confronted people in their homes, asking them to make an immediate change in legal position, *i.e.* contracting to purchase magazines. Notwithstanding the constitutional guarantee of freedom of press, the city had the power to protect people from

such confrontations. That, *amicus* submits, is the true distinction between *Martin* and *Breard*.

Breard confirms what *Cantwell* said 11 years earlier. A "State may by general and non-discriminatory legislation regulate the times, the places, *and the manner of soliciting* upon its streets . . . ." *Cantwell*, *supra*, 310 U. S., at 304. The prohibition on door-to-door sales in *Breard* was a reasonable regulation of the *manner* of solicitation, justified by the interest of residents in avoiding "the annoyances of house-to-house canvassing." 341 U. S., at 644. The annoyance caused by salesmen is greater than that caused by people distributing handbills. The ban on door-to-door selling was therefore upheld in *Breard*, while prohibitions on free distribution of literature in *Lovell* and *Martin* were struck down.

B. The Schaumburg Case.

Schaumburg v. *Citizens for a Better Environment*, 444 U. S. 620 (1980) dealt with a discriminatory prior restraint. Charities were required to obtain a permit before soliciting. *Id.*, at 623-624. Some charities would be issued the permit and some would not. Those that spent more than 75% of the proceeds for salaries and administrative expenses would not be issued the permit. *Id.*, at 624.

Schaumburg reviewed the history described above to answer the contention that solicitation was completely unprotected. See *id.*, at 628. After reviewing the history, *Schaumburg* concluded that charitable solicitation "has not been dealt with in our cases as a variety of *purely* commercial speech." *Id.*, at 632 (emphasis added).

This conclusion is fully consistent with the statements in *Cantwell* and *Breard* that solicitation, whether for a charity or a magazine, remains subject to reasonable regulation. Unfortunately, in discussing *Breard*, *Schaumburg* dwells on the fact that charitable solicitation was not involved in that case. 444 U. S., at 631-632. As explained

ante, at 12-14, that is not the true distinction between *Breard* on the one hand and *Murdock* and *Martin* on the other.

On its facts, *Schaumburg* is straightforward. The 75% requirement operated as a form of censorship. One medium of communication, door-to-door solicitation, was open to proponents of some causes but denied to those deemed less worthy by the government. The connection between the 75% requirement and the prevention of fraud was too tenuous to justify such a regulation. *Id.*, at 636-637. There was no connection at all between the 75% requirement and the protection of residential privacy and safety. These interests are invaded to the same degree by any solicitor. *Id.*, at 638.

Schaumburg thus plowed no new ground on the status of solicitation. After *Schaumburg*, as before, charitable solicitation is within the protection of the First Amendment but subject to some regulation. The ordinance in *Schaumburg* was simply held to be beyond the bounds of permissible regulation. *Schaumburg* did not need to discuss time, place, and manner regulations in any depth, because the portions of the ordinance which imposed those kinds of restrictions were not at issue. See *id.*, at 622, n. 1, 639.

In part IV, we will explain why the Port Authority's prohibition on the "solicitation *and* collection of funds" is constitutionally permissible, both as a regulation of conduct and as a time, place, and manner restriction. First, though, we will explain in part III why the government has a strong interest in regulating in-person solicitation for immediate payment of money.

III. The government has substantial interests in restricting uninvited personal solicitation for the immediate payment of money.

Much of the confusion in this area results from a failure to distinguish between solicitation in general and a personal solicitation in which the target is asked to make an immediate payment of money or some other change in legal position. The difference was recognized in *Thomas* v. *Collins*, 323 U. S. 516, 540 (1945). It is central to the "reasonableness" determination of the plurality in *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 586, 110 S. Ct. 3115, 3123 (1990), and it is the cornerstone of the *Kokinda* concurrence, *id.*, 111 L. Ed. 2d, at 589, 110 S. Ct., at 3125 (Kennedy, J.).

The state has significant interests in the prevention of fraud and the prevention of duress. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940). As example of the kinds of problems solicitation can involve, we refer to the facts determined by the District Court in *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980). We do not cite them as the record in this case or imply that the Krishna Society has engaged in similar frauds in the Port Authority's airports. We cite them as "published material containing facts which bear upon the reasonableness of legislation." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 565 (6th ed. 1986). These past abuses would be equally relevant to the reasonableness of the regulation if they had been perpetrated by an entirely unrelated organization. They are relevant regardless of whether any solicitors are presently perpetrating them in the airports. Government interest is not limited to locking the barn door after the horse is stolen.

The Krishna Society's practices in *Barber* contrast sharply with those of the Jehovah's Witnesses in *Cantwell*. The latter were considered obnoxious precisely *because* they pushed their intolerant beliefs so vigorously. 310

U. S., at 301. A principal complaint in *Barber* was that the solicitors *concealed* their religious affiliation. 506 F. Supp., at 158-159. Rather than spreading their Word, they falsely or misleadingly told targets that the money was for "worldwide education and food distribution programs or children's drug programs," *id.*, at 159, or "starving children," *id.*, at 161. Items to be given away or sold were intentionally chosen and marked to conceal the solicitor's Krishna affiliation. *Id.*, at 162. The cryptic acronym "ISKCON" was used as a part of this effort. *Id.*, at 161.

Nor was misrepresentation the only form of fraud. The solicitors intentionally miscounted change. They folded over bills to shortchange people. *Id.*, at 160. They even stooped to targeting the mentally retarded. *Id.*, at 161.

In addition to fraud, the Krishna Society practiced various forms of duress. Some were subtle, some were not. Couples with young children were targeted. They were considered "easy marks because they cannot afford to divert their attention for very long from watching the children. Thus, the persistent Krishna solicitor can be relatively assured of a contribution, just so he will go away and let the couple go about their business." *Id.*, at 161. A related technique was to intentionally hold bills for a long time, pretending to make change, until the target was too tired or distracted to insist on the amount of change the solicitor had agreed to give. *Id.*, at 159, 163. Solicitors with less imagination simply disappeared into the crowd with the change, in one case taken from a young woman afflicted with cerebral palsy. *Id.*, at 161.

The District Court in *Barber* found that regulation of in-person solicitation was necessary "to combat widespread fraud *that cannot be effectively checked by the criminal*

justice system." *Id*., at 169 (emphasis added).[6] Theft of small amounts by oral misrepresentation, shortchanging, or subtle duress is extremely difficult to prove beyond a reasonable doubt. Any criminal prosecution would involve an expenditure of the victim's time worth far more than the amount taken. This is especially so in an airport, where the victim is probably from out of town. Indeed, unscrupulous solicitors probably select airports and state fairs for precisely this reason.[7]

Many sources have recognized the special problems of personal solicitation for immediate payment or other change of legal position. *Breard* v. *Alexandria*, 341 U. S. 622, 644 (1951) noted the problem of the "persistent solicitor." The Federal Trade Commission has for 20 years held that it is "an unfair and deceptive act" to make a door-to-door sale without a three-day "cooling off" period for the buyer to change his mind. 16 C.F.R. § 429.1 (1991).[8]

The Postal Service came to a similar conclusion, and the *Kokinda* plurality quoted its findings with approval.

> " 'Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection

6. The Court of Appeals reversed, 650 F. 2d 430 (CA2 1981), but substantially the same regulation was ultimately upheld in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981).

7. In addition to fraud and duress, people also have an interest in not being, to use the vernacular, "hassled." This interest might not by itself be sufficient, and the Krishna Society therefore attempts to portray it as the only interest involved. See Petition for Writ of Certiorari, Question 3. In addition to the other interests, *amicus* submits, the "hassle factor" weighs in the balance as a government interest.

8. "Door-to-door" is not limited to in-home sales for this purpose. It would include sales on the street. *Id*., Note 1(a).

> usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor.' " *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 585, 110 S. Ct. 3115, 3123 (1990) (quoting 43 Fed. Reg. 38824 (1978)).

Justice Kennedy cites with approval a similar ban promulgated by the National Park Service for the District of Columbia Mall and other parks. 111 L. Ed. 2d, at 589-590. 110 S. Ct., at 3126 (concurrence). These parks are public forums. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 303, n. 2 (1984) (Marshall, J., dissenting).

Both *Kokinda* and *Heffron* approved regulations which banned or restricted in-person solicitation for immediate payment in places where other forms of expressions were freely allowed. *Heffron* was unanimous on this point. 452 U. S., at 654; *id*., at 657 (Brennan, J., concurring in part); *id*., at 663 (Blackmun, J., concurring in part). "[I]n-person solicitation deserves different treatment from alternative forms of solicitation and expression." *Kokinda*, 111 L. Ed. 2d, at 589; 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment).

A civilized society must make its rules without forgetting its most vulnerable members. To the seasoned, sophisticated "frequent flyer," airport solicitation may be only a delay, an obstruction, and a nuisance.[9] To the inexperienced, the naïve, the frail, the frightened, the harried, or the physically or mentally impaired, it can be much worse.

9. Petitioners' contention that airport solicitation is "accepted practice," Pet. Brief 19, is overstated. It would be more accurate to say that veteran travelers are resigned to it because they believe nothing can be done.

IV. The state may constitutionally ban such solicitation in the airport, regardless of whether it is a public forum.

The regulation at issue in this case is Airport Rules and Regulations, the Port Authority of New York and New Jersey, Chapter III, which reads in part as follows (emphasis added):

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> "1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> * * *
>
> "(b) The sale *or* distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> "(c) The solicitation *and* receipt of funds."

The use of the conjunctive in paragraph (c) implies that pure solicitation not accompanied by receipt would be permitted. That is, a person who wished to explain his cause to passers-by and ask them to make a donation later, such as by mailing it in or by placing it in a collection box located somewhere else, would be permitted to do so. Such a regulation, *amicus* submits, is precisely the kind which this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940) assured the nation would be permitted. Paragraph (c) is valid regardless of whether the airport is a public forum.

A. Conduct.

Collecting funds is conduct, and conduct is subject to regulation, even when it is intertwined with advocacy. *Thomas* v. *Collins*, 323 U. S. 516, 540 (1945). The traditional test for regulation of "expressive conduct" is the four-part test of *United States* v. *O'Brien*, 391 U. S. 367 (1968), the draft-card burning case. The *O'Brien* test applies "when 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . ." *Id.*, at 376. In such cases,

> "a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377 (numbers added).

The first point is rarely a problem. It refers to limitations on government other than the First Amendment, because otherwise the analysis would become circular. *O'Brien* simply noted that the draft was within one of the enumerated powers of Congress. *Ibid.* The second part, government interest, is discussed in part III, *ante*.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943) and *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980), solicitation was held to be within the category of noncommercial speech only because of its connection within the religious and environmental messages of the respective groups. The "free expression" in the third part of *O'Brien* must therefore refer to the message of the cause and not to solicitation itself.

The Port Authority's across-the-board ban on solicitation and receipt of funds meets the third part of the test.

It applies equally to the Krishna Society and the Airline Passengers' Association. It is not being applied because of disagreement with the message presented. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 295 (1984). The regulation differs sharply from the statutes in *Texas* v. *Johnson*, 491 U. S. 397 (1989) (flag burning) and *Stromberg* v. *California*, 283 U. S. 359 (1931) (display of red flag) which prohibit conduct typically only engaged in by people of a disfavored viewpoint. Unlike the discretionary permit cases, see *ante*, at 7-9, and percentage-test cases,[10] this regulation has no potential for favoring one viewpoint over another.

For the fourth part of the *O'Brien* test, the word "essential" must be read in the context of the facts and holding of the case. No one could seriously contend that a prohibition on draft-card burning was "essential" to the draft in the sense that the Selective Service System would collapse without it. It was enough that the continuing availability of the cards "substantially furthers" the functioning of the system and that "no alternative means . . . would more precisely and narrowly assure" that availability. 391 U. S., at 381.

The meaning of the fourth part of *O'Brien* is further illustrated by *Clark* v. *Community for Creative Non-Violence*, *supra*. The Court of Appeals had held that a ban on camping in Lafayette Park (the quintessential public forum) was "unnecessary and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest. . . ." 468 U. S., at 299. This Court reversed, holding that the Court of Appeals' suggested alternatives "represent no more than a disagreement with the Park Service over how much protection the core parks require *or how an acceptable level of preservation is to be attained*." *Ibid*. (emphasis added). See also *post*, at 26 ("narrow tailoring").

10. *Schaumburg*, *supra*; *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988).

Fraud and extortion can, of course, be criminally punished. Yet the victim who is falsely told the money is going for starving children, see *ante*, at 17, may never know that it does not. The mentally retarded target will also never know. The person who is sold a record in JFK Airport will not know he has been cheated until he gets home to Tucson and plays it. Only then would he discover that it contains a Krishna song and not a performance by Stevie Wonder, as he had been intentionally led to believe. See *Barber*, *supra*, 506 F. Supp., at 162. It is unlikely he will return to New York to press charges. The person who gives a dollar to get a persistent solicitor to stop blocking his path or stop following him with repeated entreaties will likely not want to testify in a criminal case. The elderly woman who feels physically intimidated, though no overt threat is made, will probably be unable to state a case for a criminal prosecution.

In-person solicitation for the immediate payment of money is therefore fraught with potential for widespread but low-level crime. The only legitimate donation is one given by a person who understands the nature of the cause and genuinely wishes to support that cause. When a person gives because of misrepresentation of the cause, because giving is the easiest way to be allowed to proceed in peace, or because of fear, that person has been cheated or robbed.

The Port Authority has decided that a nondiscriminatory ban on repetitive solicitation and receipt of funds is necessary. The Krishna Society, like the Community for Creative Non-Violence, simply asks this Court to disagree. The answer should be the same.

B. Time, Place, and Manner.

A limit on expressive conduct is valid if it passes the *O'Brien* test even if it is an outright prohibition rather than a mere time, place, or manner regulation. Conversely, a time, place, or manner regulation is valid if it passes the test for such regulations, even if it regulates "pure speech" rather than expressive conduct. It follows, then, that a regulation of the time, place, or manner of expressive conduct need only pass one test or the other to be valid. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298, n. 8 (1984). In practice, though, most regulations will pass both tests or neither, because the two tests are "in the last analysis . . . little, if any, different. . . ." *Id.*, at 298.

The regulation in this case, like the one in *Kokinda*, restricts the manner of solicitation. The Port Authority allows speech generally. See Pet. Brief 41. Nothing stops the Krishna Society's members from explaining their religion and asking people to make a donation at some other time and place. The least intrusive way to collect donations is for donors to mail them in.[11] Alternatively, the Port Authority would permit the Society to collect donations on the sidewalk outside the airport. See *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F. 2d 576, 578, n. 2 (CA2 1991). For donations too small to justify postage, departing passengers, having been informed inside of the purpose of the collection, could leave them with a collector on the sidewalk.

These *manners* of solicitation differ from the manner involved in *Kokinda* and the present case in that they give the potential donor a "cooling off" period, similar to the one required by the FTC for door-to-door sales. See *ante*, at 18. Away from the "eager gaze of the solicitor," the potential donor can better reflect whether he really has

11. *Amicus* CLF collects *all* of its "grass roots" donations in this manner.

sufficient information about this ostensible charity, or whether his funds would do more good elsewhere.

"[R]estrictions of this kind are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant government interest, and [3] that they leave open ample alternative channels of communication of the information." *Clark*, *supra*, 468 U. S., at 293 (numbers added).

The first part of this test (the "TPM test," for brevity) is essentially the same as the third part of *O'Brien*. Discrimination between viewpoints is the cardinal First Amendment sin. A restriction passes muster if its "applies evenhandedly to all," and is not a "means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The Krishna Society's chosen medium, not its message, is the basis of this regulation.

On this point, *Heffron* is dispositive. A nondiscriminatory restriction on all would-be solicitors is content-neutral. 452 U. S., at 648-649; see also *Kokinda*, *supra*, 111 L. Ed. 2d, 587-588, 110 S. Ct., at 3124-3125 (plurality); *id.*, 111 L. Ed. 2d, at 590, 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment). *Heffron* also noted that a restriction which "prefers listener-initiated exchanges to those originating with the speaker" is both content-neutral and within the realm of time, place, and manner regulation. 452 U. S., at 649, n. 12. A separation of advocacy from collection is no more restrictive, and probably less so.

The second part of the TPM test, narrow tailoring, is essentially the same as the fourth part of *O'Brien*. This regulation passes the test for the reasons discussed *ante*, at 22-23.

Ward, *supra*, sheds further light on this part of the TPM test. *Ward* flatly rejected the contention that the regulation must be the least restrictive means to be valid. 491 U. S., at 798. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.*, at 799. *Clark*, *supra*, applies the requirement by saying "if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out." 468 U. S., at 297. The regulation here clearly makes passengers less exposed to fraud and duress than they would be without the regulation.

"The final requirement, that the guideline leave open ample alternative channels of communication, is easily met." *Ward*, *supra*, 491 U. S., at 802. It is easily met in this case as well. As we described at the beginning of this part, *ante*, at 24, the Krishna Society is free to explain its religion to travelers, if that is what it wishes to do. It is free to encourage legitimate donations by mail or on the sidewalk.

The only thing it is not free to do (as far as paragraph (c) of the regulation is concerned) is collect donations "under the eager gaze of the solicitor." That method of collection is most efficient for *precisely* the reason the state has a strong interest in forbidding it. This manner of solicitation collects money from people who would not contribute if they thought it over and decided in private. The First Amendment does not guarantee maximum revenue. See *Swaggart Ministries* v. *Cal. Bd. of Equalization*, 493 U. S. 378, 391 (1990).

The regulation prohibiting solicitation and receipt funds is valid if it meets either the *O'Brien* test or the time, place, and manner test. It meets both.

CONCLUSION

The judgment of the Court of Appeals, insofar as it upholds the solicitation regulation, should be affirmed.

March, 1992

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
JEANNE M. ANDRACHEK

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

SUPREME COURT, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

(15) (15)

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE, Superintendent of Port Authority Police,
Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER WALTER LEE

Benjamin J. Brown
Counsel of Record
National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5424
(Attorneys continued on inside cover)

BEST AVAILABLE COPY

[redacted]
City Attorney
P.O. Box [redacted]
Ft. Worth, TX 76114

Robert J. Aldis
City Attorney
A. Noel Rominger, Comm.
300 South Sixth Street
Minneapolis, MN 55487

Joseph L. Anderson
Town Counsel of Plymouth
Kopelman & Paige
101 Arch Street
Boston, MA 02110

Frank B. Gumney, III
City Attorney
P.O. Box 2455
Daytona Beach, FL 32115

William I. Thornton, Jr.
City Attorney
101 City Hall
Durham, NC 27702

Frederick S. Dunn
City Attorney
P.O. Box 27210
Tucson, AZ 85726

Neal M. Janey
City Solicitor
City Hall, Room 101
100 N. Holliday Street
Baltimore, MD 21202

[redacted]
City Attorney
[redacted]
[redacted]

William J. Cowen, Jr.
Township Solicitor
215 Dutton Road
Wallington, NJ 07057

Patricia A. Lynch
City Attorney
City Hall
P.O. Box 1900
Kent, WA 98035

Robert J. Shaffer
Corporation Counsel
City of Newton
Newton, MA 02158

[redacted]
City Attorney
[redacted]
Palm Bay, FL 32905

[redacted]
City Attorney
[redacted]
[redacted]
Overland Park, KS 66212

John J. Hamilton
Attorney for Municipalities
525 South Vine Street
Park Ridge, IL 60068

Iris J. Jones
Austin, Texas

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INTEREST OF THE *AMICUS CURIAE*

The National Institute of Municipal Law Officers (NIMLO) is a non-profit, non-partisan organization, consisting of over 1,400 local governments and their city

attorneys. NIMLO is dedicated to gathering and disseminating information on the most recent legal developments affecting municipalities.[1] NIMLO has a vital interest in the outcome of this case because many NIMLO members operate airports and other facilities devoted solely to transportation, such as mass transit systems.

As public-sector attorneys, NIMLO members recognize the importance of First Amendment expression and carefully weigh a municipality's attempt to restrict expressive activity. At the same time, as operators of special-purpose facilities similar to those at issue in this case, NIMLO members take the position that the Port Authority's restriction of repetitive solicitation and leafletting at its airports is reasonable and viewpoint-neutral.

Petitioners in this case seek to persuade this Court that airports are public fora by making an analogy to sidewalks and streets. Petitioners' argument ignores the specialized purpose of airports – to facilitate the movement of air passengers and air cargo – which distinguishes them from traditional public fora. This brief examines the case law applying the public forum doctrine and demonstrates why airports are particularly ill-suited to be places for expressive activity and why they should be considered non-public fora.

STATEMENT OF THE CASE

This brief argues that the Second Circuit was correct in finding that airports are not public fora in accordance with the plurality opinion in *United States v. Kokinda*, 110 S.Ct.

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[1] Letters of consent by the parties to the filing of this brief *amicus curiae* have been served on the Court pursuant to Rule 37.3.

3115 (1990). Even more than the postal sidewalk in *Kokinda* used by postal service patrons, airports serve a special function in sharp contrast to traditional public fora. The regulation of solicitation and leafletting at airports is uniquely designed to further the purpose of airports--to facilitate the timely arrival and departure of air passengers.

The decision of the Second Circuit holding that the Port Authority airports were not public fora[2] and upholding the regulation of solicitation at the airports should be affirmed. The part of the decision striking down the regulation of leafletting at the Port Authority airports should be reversed, because leafletting, like solicitation, disrupts the flow of pedestrian traffic, and its regulation by airport operators is reasonable in light of the special function served by airports.

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[2] In a subsequent decision by the Second Circuit, *Longo v. United States Postal Service*, ___ F.2d ___, 1992 W.L. 3512 (2d Cir. Jan. 13, 1992), the court, per Judge Timbers, stated in dictum that in *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576 (2d Cir. 1991) (*ISKCON*), the Second Circuit did not reach the issue of whether airport terminals are traditional, designated or nonpublic fora. 1992 W.L. 3512 at 6. However, the dictum in *Longo* notwithstanding, and contrary to the assertion in the *Amici Curiae* Brief of the American Newspaper Publishers Assoc., *et al.*, in *ISKCON*, the Second Circuit applied the analytic framework used by the plurality in *Kokinda* to hold that the Port Authority airports were not public fora. (PA 13); *see Amici Curiae* Brief, American Newspapers Publishers Assoc., *et al.* at 2. Referring to previous decisions in other circuits which held that airports were public fora, *e.g. Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the court stated: "We believe, however, that *Kokinda*, has altered public forum analysis and that we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (PA 10-11).

SUMMARY OF ARGUMENT

The public forum doctrine, as set forth in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), is the analytic framework which this Court has used to balance the interests of the individual in expressive activity against the interests of the government in regulating such activity on its property. The *Perry* model weighs the significance of the government's interest by examining the nature and purpose of the forum where the speech activity would take place. 460 U.S. at 45-46.

Under *Perry*, courts apply a sliding scale to assess the permissibility of regulation of First Amendment activity on government property: in a traditional or designated public forum, the government must show that any content-based exclusion of speech activity is necessary to serve a compelling state interest. For a content-neutral regulation to be valid, it must be narrowly tailored to serve a significant interest and leave open alternative means of communication. *Perry*, 460 U.S. at 45. On the other hand, in a non-public forum, the government's regulation of speech, to reserve the forum for its intended purpose, will be upheld if the regulation is reasonable and viewpoint-neutral. 460 U.S. at 46. The balancing test which is at the heart of public forum analysis fits neatly within the long tradition of First Amendment jurisprudence which weighs the individual's First Amendment rights in a democracy against society's interest in maintaining public order. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

In the present case, the Port Authority's regulation of solicitation and leafletting preserves the airports for their intended purpose. The Port Authority's interest in maintaining safe, orderly airports outweighs the restriction on petitioners' First Amendment rights caused by the Port

Authority's regulation of solicitation and leafletting.[3] The Second Circuit correctly concluded that where the government dedicates a public facility like an airport for the sole purpose of air transportation, the airport may promulgate reasonable, non-discriminatory regulations on solicitation activity. (PA 13-15). The Second Circuit's finding that the regulation of in-person solicitation at airports was reasonable finds ample support in the record.

However, the Court of Appeals erred in striking down the Port Authority's restriction on leafletting at the airports. Pedestrian congestion and bottlenecks due to poor weather conditions and other unpredictable variables that accompany air travel, are particularly acute at the nation's airports. (JA 456). As petitioners themselves concede in their Petition for A Writ of Certiorari, "(l)iterature distribution, permitted under the court of appeals' decision, might well be as disruptive to a traveller 'hurrying to catch a plane or to arrange ground transportation', App. 14, *ISKCON* 925 F.2d at 582, as a request for a voluntary donation." Petitioners' Writ of Certiorari, p. 22. If a passenger misses his/her plane by a matter of seconds, waiting time for the next available flight can vary from less than an hour to many hours. (JA 455). The Port Authority's restriction on leafletting is reasonable given the peculiar function of airports as a transit point for air passengers. In addition, the Port Authority's restriction on leafletting is valid because it does not discriminate based on the viewpoint of the speaker, but applies evenhandedly as does the ban on solicitation.

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[3] The Port Authority's prohibition against solicitation and leafletting, applies only to the "interior areas" of the Port Authority airports. However, it is NIMLO's position that airport sidewalks as well as airport interior areas are not public fora. *See United States v. Kokinda* 110 S. Ct. 3115 (1990).

ARGUMENT

I. AIRPORTS ARE NOT PUBLIC FORA, BECAUSE THEIR PURPOSE IS TO FACILITATE THE MOVEMENT OF AIR PASSENGERS AND CARGO, AND THEY HAVE NOT TRADITIONALLY BEEN OPEN TO THE PUBLIC FOR EXPRESSIVE ACTIVITY

By tradition and purpose, airports are not gathering places for casual passersby; rather, they are uniquely designed to expedite the safe and orderly movement of air passengers and air cargo. (JA 465).

Petitioners, who engage in fund-raising and leafletting as part of their religious practice of *sankirtan*, commenced this action to challenge the Port Authority's ban on repetitive solicitation and distribution of literature at the airports. (JA 34-35). This Court has long recognized that solicitation and the distribution of literature are protected speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980) ("(S)oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech..."); *Perry*, 460 U.S. 37 (1983).

But this Court has also long held that government ownership of property does not automatically open that property to the public for expressive activity, particularly where, as here, the government is providing a specific service to the public by operating a special-purpose facility. *Kokinda*, 110 S.Ct. at 3119 (1990) (holding that solicitation could be prohibited on postal service sidewalk); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (holding that the Postal Service could prohibit the placing of non-mailed literature in a letter box); *Greer v. Spock*, 424 U.S. 828 (1976) (holding

that political campaigning and the distribution of literature could be restricted at a military base). In the present case, the Second Circuit correctly found that airports are not public fora, because they have not been open to the public for expressive activity, but rather are designed solely to meet the transportation needs of the air passengers who use them. (PA 14-15).

Less than two years ago, a plurality of this Court held in *Kokinda* that a sidewalk adjoining a post office was not a public forum because the Postal Service had not expressly dedicated its sidewalks to any expressive activity. Rather, the sidewalk was intended for the sole use of postal service patrons. 110 S. Ct. at 3120. In so holding, Justice O'Connor, speaking for the plurality, employed the tripartite framework first used in *Perry*, 460 U.S. 37 (1983), to assess how and to what extent First Amendment activities may be regulated on government property.

In *Perry*, the Court found that the regulation of speech on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, should be examined under the strict scrutiny standard. 460 U.S. at 45.[4] The same standard applies where the government has designated a forum for speech activity. *Id.; see Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university which had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use); *Kokinda*, 110 S. Ct. at 3119.

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[4] In a traditional public forum, only content-neutral time, place and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative means of communication may be imposed. *Perry*, 460 U.S. at 45.

However, where the government has not dedicated its property to First Amendment activity, its regulation of speech activity will be upheld if it is reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46; *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). The three-tiered framework of public forum analysis employs a series of balancing tests, which weighs the government's interest according to the particular function of the forum where the speech activity is proposed to take place. The Court logically applies the lesser standard of "reasonableness" where the forum is determined to be nonpublic because it is used for a specific purpose. *See Kokinda*, 110 S. Ct. at 3120.

The balancing of interests which the Court must weigh in public forum analysis is a hallmark of First Amendment jurisprudence.[5] As this Court said in *Cox v. Louisiana*, 379 U.S. 536, 554 (1965):

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

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5 *Amicus curiae* American Civil Liberties Union (hereinafter "A.C.L.U.") asserts in error that the public forum doctrine is not grounded in the First Amendment, even though the balancing tests used in public forum analysis are widely employed in First Amendment cases. Brief of A.C.L.U. at 7.

To date, the Supreme Court has had only one occasion to apply the public forum doctrine to a transportation system. In that case, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court held that advertising space on a city transit system was not a public forum, and upheld the city's ban on political advertising.

In the present case, the Port Authority's interest in the orderly movement of air travellers at its airports clearly outweighs the restriction on petitioners' rights caused by the regulation of solicitation and leafletting. Petitioners contend that the mere presence of stores and shops in the airports to serve air passengers render airports public fora. Petitioners' Brief at 17. As this Court has repeatedly held, "(t)he mere physical characteristics of the (government) property cannot dictate forum analysis." *Kokinda*, 110 S. Ct. at 3120. Rather, the location and purpose of the public facility determine whether or not it is a public forum. *Kokinda*, 110 S.Ct. at 3121.

As the Second Circuit correctly found, although airport terminals are generally "open to the public, virtually everyone who enters the terminal does so for a purpose related to air travel. These include travelers, persons meeting or seeing off passengers, members of flight crews, and employees of the terminal, an airline or business in the terminal." (PA 5). As set forth in the affidavit of Morris Sloane, former Director of Aviation Operations for the Port Authority: "The only purpose of all three of the Port Authority airports is the facilitation of air passenger and air cargo transportation." (JA 464). The commercial establishments found in airport concourses are designed to serve the needs of waiting air passengers and other airport users, such as airline employees. (JA 453-454). Airports thus stand at the opposite side of the spectrum from the quintessential public fora-- public streets and parks which

make up "the daily commerce and life of the neighborhood or city." *Kokinda,* 110 S.Ct. at 3120.

In *Kokinda,* the Court ruled that the Postal Service could prohibit solicitation on public property because postal service property was not intended for expressive activity for the general public, but was intended to serve the needs of postal patrons. The Court reasoned that:

> The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads from the parking area to the front door of the post office. Unlike the public street described in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981), which was "continually open, often uncongested, and constitute(d) not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people (could) enjoy the open air or the company of friends and neighbors in a relaxed environment," *id.* at 651, 101 S. Ct. at 2566, the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry.*

110 S. Ct. at 3120.

Airport sidewalks and interior spaces are also not "traditional public sidewalks," but are more akin to the streets and sidewalks found in a military installation described in *Greer v. Spock,* 424 U.S. 828 (1976). In that

case, this Court upheld Fort Dix regulations governing political campaigning and the distribution of literature, even though civilians had access to unrestricted areas of the military reservation. In so holding, the Court reasoned:

> The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida,* 385 U.S. 39, 48, 17 L Ed 2d 149, 87 S Ct 242. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.,* at 47, 17 L Ed 2d 149, 87 S Ct 242.

424 U.S. at 836.

> The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.

424 U.S. at 838.

More stringent than the security measures described in *Greer* at the Fort Dix military base, 424 U.S. at 830, airports, particularly over the course of the last two decades, have taken steps to restrict access to parts of airport terminals to ticketed air passengers only. (JA 459). Federal regulations require the screening of air passengers. (JA 459). The presence of persons soliciting and leafletting who have no connection to air travel complicates the task of airport operators in providing for the safety and security of air travellers.

Further, like persons waiting in line at the local post office, airport users are a captive audience for unwanted solicitation. (JA 458). As Justice Kennedy said in his concurring opinion in *Kokinda*: "Many of those who use postal facilities do so from necessity, not choice." 110 S. Ct. at 3125. The lack of choice for waiting air passengers is more apparent and more compelling, particularly air travellers in peak travel periods or during inclement weather, whose confinement is more prolonged and more confined than a person using a postal sidewalk. As Mr. Sloane points out: "Persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction." (JA 458).

In fact, as set forth in the 3(g) Statement of the Superintendent of Port Authority Police:

> The airport terminal concourses are not used as thoroughfares to or from destinations within the surrounding communities, nor as gathering places for community activities. Virtually all of the persons in the airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes.

(JA 458) (paragraph numbers and cross-references omitted).

Thus, airport sidewalks and concourses are not like the sidewalks surrounding the Supreme Court, which this

Court held in *United States v. Grace*, 461 U.S. 171 (1983), to be a public forum. As the Court in *Grace* explained:

> The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer v. Spock, supra*. In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

461 U.S. at 179-80 (footnotes omitted).

Nor does the existence of large concourses, shops, restaurants, and other places designed to serve waiting passengers mean that the airport operator has created a public forum because of opportunities for "limited discourse" among air travellers and others meeting or waiting for arriving passengers. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. at 802 (1985) (holding that the fund-raising campaign for federal employees was not a public forum to which all fund raising

organizations should have equal access); *Cf. Widmar v. Vincent* , 454 U.S. 263 (1981); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975) (Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities).

The decisions relied upon by petitioners which were rendered by other circuit courts, holding that airports were public fora, have no precedential value, since they all predate this Court's decision in *Kokinda*, which held that a postal sidewalk was not a public forum. *See, e.g., Kuszynski v. City of Oakland,* 479 F.2d 1130 (9th Cir. 1973); *Chicago Area Military Project v. City of Chicago,* 508 F. 2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760, 765 (D.C. Cir. 1983) (comparing airport terminals to "public thoroughfares"); Petitioners' Brief at 18-19.

Moreover, all of these decisions relied on general physical characteristics such as public ownership and public access which this Court has long held are not dispositive by themselves of whether a facility is a public forum. As this Court recently said in *Kokinda:* "Postal entryways, like the walkways at issue in *Greer,* may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." 110 S.Ct. at 3121. In addition, because of the similarities between airports and the military installation described in *Greer,* which, as discussed above, are both characterized by physical isolation, security concerns and a special purpose, the circuit court decisions holding that airports are public fora cannot be reconciled with this Court's decision in *Greer,* holding that a military base was not a public forum. 424 U.S. 828, 836-37.

II. THE PORT AUTHORITY'S PROHIBITION OF IN-PERSON SOLICITATION AT PORT AUTHORITY AIRPORTS SHOULD BE UPHELD AS A REASONABLE REGULATION OF A NON-PUBLIC FORUM

It is undisputed that airports are uniquely concerned with the smooth, safe, and expeditious movement of air passengers and air cargo. (JA 453). Mr. Sloane of the Port Authority states that: "Airport pedestrian congestion is the Port Authority airports' single greatest problem." (JA 466). The problem of congestion is not necessarily tied to a particular time of day or time of year. For example, a snowstorm in Chicago may delay departing passengers from Newark Airport to Chicago. A car accident along an access route to Kennedy Airport may leave only a few minutes for a passenger to make his or her flight. In such a case, even if the airport concourse is not crowded, a solicitor who blocks a passenger's path can cause that person to miss her flight.

The Port Authority restriction on solicitation easily meets the test of reasonableness, since it is designed to reduce delays at the airport, and help address the needs of air passengers who often face severe time constraints in catching their flights. *Cornelius v. NAACP Legal Defense and Educational Fund* , 473 U.S. 788, 808 (1985). As this Court said in *Cornelius:* "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Id.* Further, the restriction on solicitation is viewpoint-neutral, since it applies regardless of the identity or viewpoint of the solicitor.

As Lord Dunedin said in *M'Ara v. Magistrates of Edinburgh:* "The truth is that open spaces and public

places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." (1913) Sess. Cas. 1059, 1073-1074, *cited in Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974). Airports' consistent efforts to regulate solicitation activity underscore the reasonableness of the Port Authority's prohibition of in-person solicitation. Just as the Court in *Kokinda* found that the long-standing history of Postal Service regulation of solicitation in post offices demonstrated the reasonableness of its current regulation, so do the prior efforts of airports to regulate solicitation bear on the reasonableness of the Port Authority regulation in this case. *See Kokinda*, 110 S. Ct. at 3122 (where the Court noted that "(t)he Postal Service has been regulating solicitation at least since 1958"). A brief review of the litigation on solicitation at airports throughout the country reveals that, like the Postal Service, airports have a long history of promulgating such regulations to minimize the disruption to air passengers and other airport-related traffic.

For example, in *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975), a group challenged an ordinance promulgated by O'Hare Airport, regulating solicitation and leafletting which dated back to June 1, 1956. In addition, the first lawsuits in federal district courts throughout the country challenging existing airport regulations of solicitation appeared as early as 1971. *See Kuszynski v. City of Oakland*, 322 F. Supp. 689 (N.D. Cal. 1971), *rev'd and remanded*, 479 F.2d 1130 (9th Cir. 1973).

Further, like the Postal Service, airports are self-sustaining business entities. *Kokinda*, 110 S. Ct. at 3122 ("Congress has directed the (Postal) Service to become a self-sustaining service industry..."). This characteristic

underscores the proprietary nature of airports[6] and the reasonableness of a restriction on solicitation to minimize disruption to users of the airport's services, and avoid the diversion of revenue away from the airport. *Id.* As set forth in the record, Port Authority airports are financed exclusively by user fees.

Mr. Sloane describes these fees as "rentals paid by airline tenants..., landing, terminal and ramp gate fees paid by individual and corporations for use of the airports..., fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by air passengers (such as parking lot fees)." (JA 454).

As the Second Circuit accurately observed below, airport regulation of solicitation is reasonable, because solicitation is "inherently disruptive" for airport users. (PA 12, 15), *citing Kokinda*, 110 S. Ct. at 3123. The act of solicitation requires the solicitor to intercept potential donors "as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature." *Kokinda*, 110 S. Ct. at 3123. ("Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." 110 S.Ct. at 3123.)

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[6] Although the operation of public airports is indeed a governmental function, the Port Authority manages airport services in a proprietary capacity. *See Transport Limo. v. Port Authority of New York*, 571 F.Supp. 576, 581 (S.D.N.Y. 1983).

The flow of the crowd and demands of safety are more pressing in airports than on streets and public sidewalks. (JA 465-466). Thus, restricting solicitation is reasonably aimed at facilitating the flow of pedestrian traffic where a matter of seconds can "cause a traveler to incur substantial loss in travel time..." (JA 455).

III. THE PORT AUTHORITY REGULATION OF REPETITIVE DISTRIBUTION OF LITERATURE IS A REASONABLE, VIEWPOINT-NEUTRAL RESTRICTION

The Second Circuit erred in striking down the Port Autnority's regulation of the repetitive distribution of literature at Port Authority airports. The Court's reasoning appeared to be based on dicta in ***Kokinda***, which indicated that soliciting was a more disruptive activity than leafletting. 110 S.Ct. at 3124. However, a review of airport regulation in this area reveals that airport operators have been as concerned with the inconvenience to air travellers caused by leafletting as they have with solicitation.

For example, in *Chicago Area Military Project v. City of Chicago,* 508 F. 2d 921, 924 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975), O'Hare Airport promulgated an ordinance which prohibited both solicitation and the distribution of literature. It provided that:

> no person shall be permitted to picket, sell anything (except for authorized concessionaires or lessees, and they only at assigned spaces) distribute literature of any nature, or solicit or collect contributions within any building at any airport operated by the City of Chicago.

508 F.2d at 924.

In *Kuszynski v. City of Oakland,* 322 F. Supp. 689 (N.D. Cal. 1971), *rev'd and remanded,* 479 F.2d 1130 (9th Cir. 1973), a group challenged an ordinance at the Oakland airport which restricted the "distribution of non-commercial, non-obscene, non-subversive literature." *Id.* at 1130-1131. In *Fernandes v. Limmer,* 663 F. 2d 619 (5th Cir. 1981), the issue of solicitation and leafletting activities at Dallas-Fort Worth Regional Airport arose in late 1974 when members of ISKCON were arrested for soliciting funds, selling merchandise, and distributing literature in the airport terminal buildings without a permit in violation of airport regulations. 663 F. 2d at 624.

As discussed *supra* at pages 5 and 15, a delay of seconds as air passengers make their way through airport terminals can result in passengers missing their flights. (JA 455). Petitioners concede that the distribution of literature, as air passengers rush to waiting flights or ground transportation, may well be as disruptive as a request for donations. Petitioners' Writ of Certiorari, p. 22. Given the special function served by airports and the time pressures often faced by air travellers, the Port Authority's restriction of leafletting is also reasonable.

The Port Authority's narrow regulation stands in stark contrast to the regulations struck down by this Court in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987), which would have barred all expressive activity at Los Angeles Airport. In this case, restricting the repetitive distribution of literature is targeted only at regulating a narrow category of expression that disrupts airport users.

Although leafletting, unlike a request for funds, does not necessarily require an affirmative response on the part of pedestrians at the airport, the presence of leafletters slows the movement of air passengers through the airport.

Leafletting, therefore, interferes with the main aim of the airport--to provide a smooth transit point for air passengers.

Significantly, the only case in which this Court has applied the public forum doctrine to a transportation facility, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), underscores the broad leeway that this Court has granted when the government is providing a service in a nonpublic forum. In *Lehman*, this Court upheld a ban on paid political advertising in a City's rapid transit system, even though the City of Shaker Heights did not claim that mass transit users would face potential delays if such advertising were permitted. It was sufficient for this Court to weigh the city's interest in not offending passengers' sensibilities to uphold the reasonableness of the city's ban. Speaking for a plurality of the Court, Justice Blackmun reasoned:

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

418 U.S. at 304.

Similar to the prohibition in *Lehman*, the Port Authority airports' prohibition on leafletting is not an attempt to suppress a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 800. It thus avoids the "sticky administrative problems" referred to in *Lehman* by imposing a prohibition which has no reference to the identity or viewpoint of the speaker. 418 U.S. at 304.

This Court's decision in *Perry*, is in accord. In *Perry*, the Court held that a local school district could bar a rival teachers' union from distributing literature through the interschool mail system. The school district did grant access to the duly elected union representative and certain other outside organizations like the YMCA and parochial schools. 460 U.S. 47-48. Justice White, writing for the Court, reasoned that "(t)his type of selective access does not transform government property into a public forum." 460 U.S. at 47.

In fact, the Court noted, the granting of access to the elected union representative but not to its rival preserved the mail system for the use to which it was lawfully dedicated. *Id.* at 50-51. In the Court's words:

> (W)hen government property is not dedicated to open communication the government may – without further justification – restrict use to those who participate in the forum's official business.

460 U.S. at 53. Similarly, the restriction of leafletting at Port Authority airports preserves the airports for their lawfully intended purpose – the safe and expeditious movement of air passengers and air cargo.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Second Circuit Court of Appeals should be: (1) affirmed with respect to the court's ruling that the Port Authority airports are public fora and that the Port Authority can restrict solicitation at its airports; and (2) reversed with respect to the court's ruling that the Port Authority's restriction on leafletting at Port Authority airports violates the First Amendment.

Respectfully submitted,

BENJAMIN L. BROWN
Counsel of Record
National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5424

Dated: March 9, 1992

Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE C

Nos. 91-155 & 91-339

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Petitioners/Cross-Respondents,

vs.

WALTER LEE, Superintendent of Port Authority Police,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE AIRPORTS ASSOCIATION COUNCIL INTERNATIONAL-NORTH AMERICA (AACI-NA) IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

MICHAEL M. CONWAY*
THOMAS R. DEVINE
BRYAN S. ANDERSON
HOPKINS & SUTTER
Three First National Plaza
Chicago, Illinois 60602
Telephone: (312) 558-6600

Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

The Airports Association Council International-North America ("AACI-NA") is a cooperative, non-profit association of approximately 150 state, local and regional governmental bodies that own and operate more than 200 airports throughout North America. AACI-NA member airports serve more than 90% of the United States domestic scheduled air passenger and cargo traffic, and virtually all United States scheduled international traffic. More than 850 million annual passenger enplanements and deplanements occurred at our U.S. airports in recent years.

AACI-NA submits this *amicus* brief to urge that our nation's public airports be allowed to preserve their fundamental air transportation purpose by regulating First Amendment activity on their premises so as to prohibit fund solicitations and leafleting. The three commercial air carrier airports operated by the Port Authority are not public fora, and they and other airports around the country have consistently resisted efforts to turn them into public fora. Historically airports have not served as venues for expression of ideas, nor would such usage be consistent with their fundamental purpose, which is to facilitate safe and efficient air travel.

If this Court should hold that the Respondent's airports are public fora, all AACI-NA United States member

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[1] This *amicus curiae* brief is filed pursuant to the consent of each of the parties to this matter, which written consents have been obtained and filed with the Clerk of this Court pursuant to United States Supreme Court Rule 37.3.

airports would be required to be made available for solicitation, leafleting and other expressive activity for which airports are not intended and which would interfere with the safe and efficient operation of the nation's airports.

SUMMARY OF ARGUMENT

Governmental regulations of First Amendment activity in both traditional public fora and designated public fora must be reasonable with respect to time, place and manner in order to be constitutional. However, in a non-public forum, a government's power to regulate First Amendment activity is much broader. Expressive activity may be reasonably regulated and even prohibited in the interest of preserving the non-public forum for the purposes for which it was intended.

This Court has consistently held that government property that has not traditionally served as a place for expressive activity may be preserved for the purposes for which it is intended and need not be treated as a public forum. *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115 (1990); *Cornelius v. NAACP Legal Defense And Educational Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Airports have a single purpose – facilitating safe, efficient and convenient air travel. Airport operations, including security measures and the need to manage heavy pedestrian traffic flows and congestion, reflect this purpose. Airport facilities financing, which relies on air transportation user fees and not general tax revenues,

similarly reflects the air transportation purpose of airports.

Because of their sole purpose of facilitating air transportation, airports have critical differences from traditional public fora. Airports, unlike traditional public fora, are not integrated into their neighboring communities. Airport patrons, unlike users of traditional public fora, are a captive audience to expressive activity being conducted in the areas which they must use in order to travel.

Because airports do not have a long tradition of being used as sites for assembly and debate, and were not created to serve as sites for expressive activity, airports are not public fora. Indeed, commonplace airport security restrictions, which would be constitutionally forbidden on a public street or town square, are compelling evidence that, to the government and its citizenry alike, airport premises are unlike public fora. Governmental airport proprietors should therefore be permitted to prohibit leafleting and soliciting at airports in the interest of preserving their air transportation purposes.

ARGUMENT

I. GOVERNMENT PROPERTY CONSTITUTES A TRADITIONAL PUBLIC FORUM ONLY IF IT HAS A HISTORY OR A PRIMARY PURPOSE OF SERVING AS A PLACE FOR EXPRESSING IDEAS

In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), this Court established a legal framework for determining whether, and to what

degree, the First Amendment requires the government to permit expressive activity in a publicly owned facility. For purposes of evaluating government regulation of expressive activity in publicly owned facilities, *Perry* differentiates between a traditional public forum, a designated public forum, and a non-public forum which is created for purposes other than expressive activity by the general public. *Perry* 460 U.S. at 45-46. Petitioners/Cross-Respondents ("Petitioners") erroneously claim that the Port Authority's three airports are public fora. They do not argue that the airports are designated public fora.

Under the *Perry* framework the government may constitutionally prohibit expressive activity in a content-neutral manner within a traditional public forum or a designated public forum only if the prohibition is reasonable as to time, place and manner. *Perry*, 460 U.S. at 45-46; *Cornelius*, 473 U.S. at 800.[2]

In a non-public forum, however, the government may constitutionally enact reasonable regulations that preserve the forum for its "intended purposes," as long as there is no viewpoint discrimination. *Perry*, 460 U.S. at 46. As the Court most recently stated in its plurality opinion in *Kokinda*, "regulation of speech activity where the

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[2] Additionally, government regulations of expressive activity within traditional public fora and designated public fora which are content-based, as opposed to content-neutral, must also be "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46. There has been no suggestion in the present case that the Port Authority's regulations are content-based.

Government has not dedicated its property to First Amendment activity is examined only for reasonableness." *Kokinda*, 110 S. Ct. at 3119-3120.

As this Court has held, a government-owned facility is a traditional public forum only if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 45). In addition, "a principal purpose of traditional public fora is the free exchange of ideas." *Cornelius*, 473 U.S. at 800.

Classic examples of traditional public fora include public streets and parks. As the Court stated in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

This Court has never specifically identified as a traditional public forum anything other than a street, sidewalk, or park. *See Cornelius*, 473 U.S. at 806; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45.

Airports are easily distinguishable from traditional public fora recognized by the Court – streets, parks and sidewalks – because airports do not have a tradition of use or a primary purpose as a place for public debate and

expression of ideas. In fact, this Court has never held that an airport is a public forum. *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Justice White, in his concurring opinion, joined in by the Chief Justice, specifically stated that the Court's opinion "should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum." *Board of Airport Commissioners*, 482 U.S. at 577 (White, J., concurring).

II. AN AIRPORT'S PURPOSE IS TO PROVIDE FOR THE SAFE AND EFFICIENT FLOW OF PASSENGERS IN AIR TRANSPORTATION

Airports facilitate air travel, not the expression of ideas. J.A. 453. As Congress stated in the Declaration of Policy of the Airport and Airway Improvement Act of 1982, "[T]he continuation of airport and airway improvement programs and more effective management of the Nation's airport and airway system are required to meet the current and projected growth of aviation and the requirements of interstate commerce, the Postal Service, and the national defense." 49 U.S.C. App. § 2201(a)(2).

All airport functions and services either directly or indirectly relate to air travel. See R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, at 325-27 (3d ed. 1983) [Lodg 3-5].[3] The special security and congestion

[3] "Lodg" followed by numerals refers to pages in the Lodging of *Amicus Curiae*. The Lodging, which has been deposited with the Court, contains copies of material other than statutes, regulations and judicial opinions referred to herein.

problems of airports reflect their primary function of providing for the safe and efficient flow of passengers in air transportation. J.A. 456, 459. Airport financing also reflects the air transportation purpose of airports by placing the cost of operating airports on the users of airports, not on the general public. J.A. 454.

A. Unique Security Concerns And Security Measures Reflect Airports' Purpose Of Facilitating Safe Air Transportation And Distinguish Airports From Traditional Public Fora

Security concerns and security measures at airports underscore airports' sole purpose of facilitating the safe and efficient transportation of air travelers and goods, and not the expression of ideas. The federal government requires screening of airport patrons and their luggage, so as to facilitate safe air travel.

The notorious history of skyjacking and other forms of terrorism at airports has resulted in the adoption of pervasive security precautions. J.A. 454. Federal law mandates these security precautions, which are taken at few other public locations.[4] Federal regulations require the

[4] Other locations marked by attendant security precautions have also been judicially and administratively recognized as not available for the general exercise of free speech rights: an Air Force base, *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990) *aff'd on rehearing en banc*, 944 F.2d 732 (1991); Internal Revenue Service offices, *United States v. Burton*, 888 F.2d 682 (10th Cir. 1989); and a federal post office and courthouse building, *United States v. Bader*, 698 F.2d 553 (1st Cir. 1983). *See*

(Continued on following page)

screening of all airport patrons and the items they are carrying when they enter "sterile" security areas – regardless of whether probable cause exists to believe that any such individual is carrying a weapon. 14 C.F.R. 107.1, 107.3, 108.5, 108.7, 108.9.

While these screening or security checkpoints are typically set up as airport patrons enter concourses leading to aircraft gates, some airports set up the sterile areas immediately after the airline ticket counters; in such facilities, aside from ticket areas, unscreened individuals may not enter the terminal. The sterile area could even be established – at the airport's option, subject only to the approval of the FAA Director of Civil Aviation Security – at the entrance to the airport terminal, thus requiring the screening of anyone seeking access to the terminal.

Airports could, if they chose, restrict access to their facilities so that only ticketed passengers or employees could obtain entry to the terminal, or even to the airport itself. In fact, in 1990-91 during Operation Desert Storm, the Federal Aviation Administration, exercising its emergency powers under 14 C.F.R. 107.11(f), *required* airports to limit access to the sterile areas to such ticketed passengers or employees. These stringent requirements were in effect for more than four months, extending even after the military operation was over. In airports where the

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also 41 C.F.R. 101-20.308 and 101-20.309 which prohibit soliciting alms and distributing flyers in property under the charge and control of the General Services Administration, as well as 39 C.F.R. 232.1(h)(1), prohibiting soliciting alms and contributions on Postal Service premises.

sterile area began immediately after the ticket counters, this federally mandated restriction effectively banned everyone but ticket holders and employees from virtually the entire airport terminal. Moreover, even in the absence of a military emergency, the general public is subjected to searches and other security restrictions, *see* 14 C.F.R. 107.1, 107.3, 108.5, 108.7 and 108.9, which would never pass constitutional muster if carried out in a park or on a city street.[5]

Such wholesale screening, without probable cause, would not be permitted in a traditional public forum, such as a village square or a city street. *See. e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (pedestrian on public street may not be searched for weapons unless officer reasonably believes that he or others are at risk of harm). That the federal government *requires* screening at airports underscores the fact that airports differ from such public fora; the government action recognizes that the function of

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[5] The fact that airports do not routinely choose to restrict access to their facilities to passengers and employees does not dilute the significance of the fact that they *could* do so. *See Kokinda*, 110 S. Ct. at 3121: "In *Greer* we held that the power of the Fort's commanding officer summarily to exclude civilians from the area of his command demonstrated that 'the notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false.' " (quoting *Greer v. Spock*, 424 U.S. 828, 838 (1976)).

airports is to provide for the safe and efficient flow of passengers in air transportation, not to provide a forum for the expression of ideas.

B. Special Problems Of Congestion Reflect Airports' Purpose Of Facilitating Efficient Air Transportation And Distinguish Airports From Traditional Public Fora

Congestion at major airports is bad and getting worse. J.A. 456. According to the Congressional Budget Office,

> Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates a worsening of airport congestion in coming years.

Congressional Budget Office, Financing U.S. Airports in the 1980's, at xix (1984) [Lodg 21]. A senior research advisor of the Transportation Research Board ("TRB") has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, TR News, May-June 1986, at 2 [Lodg 14].

One factor which has contributed to congestion in airport terminals is the use of larger aircraft to conduct aircraft operations. "Between 1972 and 1988, there was a 78% increase in the average number of passengers per aircraft operation nationwide, and a 60% increase at large hub airports." U.S. Department of Transportation, National Plan of Integrated Airport Systems 1990-1999 (1991), at p. 14 [Lodg 33]. As a result, even airports which

have not experienced an increase in the number of flights have suffered increased congestion in the terminals.

The unique pedestrian congestion problems are symptomatic of airports' singular purpose of facilitating the transportation of air travelers and goods. At an airport, unlike in a street or a park, a pedestrian delay of minutes or even seconds can cause a loss of hours in travel time because of a missed plane. J.A. 455. The design and operation of individual airports is intended to facilitate the efficient flow of hundreds of millions of people to and from tightly scheduled airline flights within a national air transportation network, not to provide places for people to congregate and express ideas. J.A. 455.

C. Airports Are Run By Governmental Entities In Their Role As Proprietors, Not Regulators, As Evidenced By The Nature Of Their Business And Their Financing.

1. Airport Financing Emphasizes The Air Transportation Purpose Of Airports

In accordance with the public policy of making users pay for transportation facilities, airports are generally financed by user fees, not by general tax funds. The source of revenue for most capital projects at airports, including their terminals, streets and sidewalks, is revenue bond financing, backed up by the airport users, who pay rentals, fees and other charges. On the other hand, general revenue bonds backed up by general tax funds finance streets and parks. Similarly, user fees, not general

revenues, pay for the operation and maintenance of airport facilities, again, in contrast to streets and parks. J.A. 454. These characteristics further distinguish airports from streets and parks and illustrate that airports are special purpose facilities which do not function as places for expressive activity. In this vein, Congress recently authorized airport operators to impose, at their option, a local "passenger facility charge, of up to $3 per enplaned passenger, to be used for capital projects to improve capacity, safety, security and noise mitigation." Aviation Safety and Capacity Expansion Act of 1990, § 9110, 49 U.S.C. App. 1513(e).

In a 1985 report to Congress, the Secretary of Transportation said that virtually all airport funding comes from airport-user sources. Department of Transportation, National Plan of Integrated Airport Systems 1984-1993, at 16 (1985) [Lodg 11]. The Port Authority's airports are typical of most major airports in the United States in that they are, in fact, financially self-supporting. At such airports, operating costs must be satisfied with revenues generated from travel related user fees. 49 U.S.C. App. § 2210(a)(9) (1988) and Supp. II (1990).

Even that portion of airport capital funding provided by the federal government does not come from general revenues, but is derived from excise taxes on airline tickets, air waybills, aircraft tires and aircraft fuel. 26 U.S.C. §§ 4041, 4261-62, 4271-72, 9502(b) (1988); 49 U.S.C. App. § 2210(a)(9) (1988) and Supp. II (1990).

The Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Title V, 96 Stat. 671, as amended, requires airports which accept federal aid (which

includes all major air carrier airports) to "maintain a fee and rental structure for the facilities and services being provided to the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection. . . . " 49 U.S.C. App. § 2210(a)(9) and Supp. II (1990).

Thus, airports are under the same type of Congressional directive as the U.S. Postal Service, as noted by this Court in Kokinda. "Congress has directed the Service to become a self-sustaining service industry. . . . " *Kokinda*, 110 S. Ct. at 3122.

2. Local Governmental Entities Operate Airports Strictly To Facilitate Efficient Air Transportation

"The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or, as was said in *Lehman*, 'arbitrary, capricious, or invidious.' " *Kokinda*, 110 S. Ct. at 3119 (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303).

While acting as an airport proprietor, local governments are constrained by the Congressional directive that the purpose of airports is to provide for the safe and efficient flow of travelers and goods in air commerce. *See, e.g.*, The Airport and Airway Improvement Act of 1982, Sections 505(a), "[i]n order to maintain *a safe and efficient nationwide system of public-use airports* to meet the present

and future needs of civil aeronautics, the Secretary is authorized to make grants from the Trust Fund for airport development and airport planning . . . " and 504(a)(1), requiring the Secretary of Transportation to publish a plan which "shall include the type and estimated cost of eligible airport development considered by the Secretary to be *necessary to provide a safe, efficient, and integrated system of public-use airports* to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense as determined by the Secretary of Defense, and to meet identified needs of the Postal Service." 49 U.S.C. App. §§ 2204(a) and 2203(a) (emphasis added).

This purpose is germane to the issue before the Court. "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation, since the significance of the governmental interest must be assessed in light of the characteristics, nature, and function of the particular forum involved." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981). In *Kokinda*, the purpose of the forum was "to accomplish the most efficient and effective postal delivery system." *Kokinda*, 110 S. Ct. at 3122. In the instant case, the purpose of the forum is to accomplish the safe, efficient and effective movement of travelers and goods in air commerce.

Consistent with this purpose, airports typically seek only to provide facilities and amenities for shippers, travelers, and those who assist them. The finding by the Second Circuit and the undisputed facts in the record of this case – that virtually everyone at the airports in

question was there on airport-related business – is typical of the experience of our members across the country. Thus, much as this Court found in *Kokinda* that "the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business," *Kokinda*, 110 S. Ct. at 3120, airport facilities are constructed solely for the passage of individuals engaged in airport business. And just as the District Court found in *Kokinda* that "Postal patrons must use the sidewalk to enter the post-office," air travelers and those who accompany them must use airport roadways, sidewalks, and terminals to get to their planes.

3. The Fact That Airports Are Theoretically Open To the Public Or Available For Other Forms Of Expressive Activity Does Not Make Them A Public Forum

Even though portions of airport facilities are open to the public, this fact does not make such facilities public fora. "Publicly owned or operated property does not become a 'public' forum simply because members of the public are free to come and go at will." *United States v. Grace*, 461 U.S. 171, 176 (citing *Greer v. Spock*, 424 U.S. 828, 836 (1976)). Although the question of whether the property has been "generally open to the public is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, *it is not determinative of the question*. . . . There is little doubt that in some circumstances the government may ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises. The government, 'no

less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.' " *Grace*, 461 U.S. at 177-178 (quoting *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966)).

Airports are just such facilities which could be closed off to all except those who have legitimate business – and as a practical matter, they are. Airports are rarely frequented by people without legitimate business on the premises, whether it is to catch a plane, help a friend or relative who is catching a plane, deplane or meet someone who is deplaning. J.A. 458. In this regard, airports are more like the Supreme Court plaza, steps and building itself – where expensive activities are prohibited – than the public sidewalks on the perimeter of the Court grounds which, as this Court found in *Grace*, are indistinguishable from any other sidewalk in the District of Columbia. *Pearson v. U.S.*, 581 A.2d 347 (D.C. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 51 (1991).

The fact that *some* airports invite the general public in for some special occasions (*e.g.*, an airport "open house"), does not make an airport a public forum any more than admission of the public to the Supreme Court building makes it a public forum or the annual airshow at an air force base, which may attract hundreds of thousands of spectators, makes the base a public forum. Rather, proper analysis of the factors outlined by the court in *Perry* must still be done.

Petitioners argue that the fact that some First Amendment expressive activity, such as campaign press conferences by presidential candidates, has been conducted on

airport premises requires a finding that airports have opened themselves up as public fora. See Petitioner's brief at 35. This Court has rejected that notion as well. "Whether or not the [Postal] Service permits other forms of speech, which may or not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic." *Kokinda*, 110 S. Ct. at 3123 (citing *Heffron*, 452 U.S. at 653).

4. Solicitation Is Inherently Disruptive Of The Business Of Operating An Airport

In *Kokinda*, this Court agreed with the Government's assertion that "it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the postal service business." *Kokinda*, 110 S. Ct. at 3123. If it is disruptive of the business of providing postal services – where people seek to mail letters and parcels, buy stamps, and pick up mail – it is even more disruptive of the business of providing air travel services, where delays of a few minutes or even seconds can mean the difference between catching a plane and missing it. This Court has recognized the problems inherent in solicitation – that the person confronted "must listen, comprehend, decide and act in order to respond to a solicitation," that "[s]olicitors can achieve their goal only by 'stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature,' " *Kokinda*, 110 S. Ct. at 3123 (quoting *Heffron*, 452 U.S. at 653), and that "sales and the collection of solicited funds

not only require the fairgoer to stop, but also 'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.' " *Kokinda*, 110 S. Ct. at 3124 (quoting *Heffron*, 452 U.S. at 665 (Blackman, J., concurring in part and dissenting in part)). Such problems are compounded at airports, where the people being solicited often have luggage which must be put down as they get out their wallets or open their purses to remove their money. Such luggage creates a further obstruction to the orderly flow of traffic in an airport.

This Court found that the above-quoted description of the disruption and delay caused by solicitation "rings of 'commonsense,' which is sufficient in this Court to uphold a regulation under reasonableness review." *Kokinda*, 110 S. Ct. at 3124. Another factor recognized by this Court as a significant disruption of the Postal Service's attempts to operate its facilities efficiently was that "[b]ecause of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals." *Kokinda*, 110 S. Ct. at 3124. Such demands place no less of a burden on airport directors. For a variety of reasons, the decisions on such issues wind up in the laps of the top officials at airports, who have other pressing demands on their time relating directly to operating the airport.

The Court in *Kokinda* was also impressed by the experience that the Postal Service had in attempting to

regulate expressive activity. Airports have attempted to ban expressive activity or, if ordered by the courts to permit leafleting and soliciting, to restrict such activities since they first manifested themselves at airports in the early 1970s.

The list of cases Petitioners have appended to their brief speaks volumes of the vigor with which airports have uniformly tried to ban or restrict those activities at their facilities. Rather than open themselves up to expressive First Amendment activities, airports have fought such activities in court because soliciting and leafleting are so disruptive of airports' purpose. As in *Kokinda*, it is reasonable in the instant case to determine that such expressive activities create significant interference with the mandate to operate the facilities in question as effectively and efficiently as possible. *Kokinda*, 110 S. Ct. at 3124.

Finally, Petitioners make much of the fact that few complaints about their activities have been received at the airports in question or at other airports. See Petitioner's brief at 11-12. It "rings of commonsense" that the people who are most disturbed by a delay of minutes or seconds as they rush through airports to catch their flights are not inclined to take the time to inquire as to how to file a complaint about being harassed or delayed, nor to take the additional time required to actually follow up. The fact that any complaints at all are filed under these circumstances is rather remarkable.

D. Physical Separation Of Airports From The Community Distinguishes Airports From Traditional Public Fora

Unlike streets and parks, airports do not provide sites for assembly and debate. Instead, airports process departing and arriving passengers to and from aircraft. Unlike streets and parks which are integrated into the day-to-day life of surrounding communities, airports are physically separated from neighboring communities. The people living near an airport do not enter it as they travel in their neighborhood. Even airport visitors frequently do not enter the terminal buildings when they drop off or pick up an air passenger.

This feature of airports – separation from the community they serve – further distinguishes airports from traditional public fora. For example, in determining whether two military bases could prohibit leafleting, the Court focused on the integration of the bases into the surrounding community. *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976). In *Flower* this Court held that a military commander could not bar leafleting on a street in Fort Sam Houston, Texas, where the streets of the military base were wholly integrated into and a part of the surrounding city of San Antonio. In *Greer*, on the other hand, the Court upheld Fort Dix's regulations forbidding leafleting in part because Fort Dix was not integrated into any surrounding community, and thereby retained its character as a separate military enclave. *Greer v. Spock*, 424 U.S. at 835-36.

Like the military base in *Greer*, and unlike the public sidewalks in *Grace*, airports are not physically integrated

into the day-to-day life of surrounding communities. When people enter airport grounds, they know it. This contrasts sharply with the situation in *Grace*, where this Court found that "[t]he sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C. . . . there is no separation, no fence, and no indication whatever to persons stepping from the street and the sidewalks that serve as the perimeter of the Court that they have entered some special sort of enclave." *Grace*, 461 U.S. at 180. This fact underscores the single purpose of an airport, air transportation, and further distinguishes airports from traditional public fora like streets and parks.

In fact, airports are immediately distinguishable as a "special type of enclave." For one thing, virtually no one enters an airport on foot. Because airports are typically separated from city centers, people either arrive via mass transit or by motor vehicle. Either way, airports are marked. There are directional signs indicating access routes to the airport, usually beginning several miles away from the airport boundary. As one enters the airport grounds, typically there are prominent signs with the name of the airport, as well as the now-familiar directional signs for Arrivals, Departures, and Rental Car Returns. As one gets closer to the terminal, there are signs for individual airlines.

Curbsides by terminal buildings are distinctive – with skycaps and their curbside check-in stations, cars and vans loading and unloading passengers with their luggage, and the plethora of hotel and rental car courtesy vans, along with long lines of taxi cabs. Indeed, airports

are so distinctive that it would be implausible for someone not to deduce that they had entered an enclave wholly distinct from the rest of the community, as opposed to an area that was fully integrated into the community.

In this regard, even more so than the sidewalks in *Kokinda* or the streets and sidewalks on the military base in *Greer*, it should be clear that even though there are roadways, curbs and sidewalks at an airport, they are not public fora. Rather, they are often heavily congested areas designed for one purpose only – to facilitate the ingress and egress of passengers and baggage and those who accompany or assist them to and from the terminals. As in *Kokinda* they are the only entryway for persons seeking to do business at the facility in question. Thus, it is reasonable for the airport proprietor to keep them less congested by banning expressive activity such as soliciting and leafleting. Although airport roadways and sidewalks are not at issue in the instant case, it is *amicus curiae's* belief that, using the standards followed by the court in *Greer*, *Grace*, and *Kokinda*, such roadways and sidewalks are not public fora.

E. The Presence Of Captive Audiences In Airports Distinguishes Airports From Traditional Public Fora

Unlike the traditional public fora of streets and parks, airports contain captive audiences. J.A. 458. Airport terminals provide the only paths that the public may use in getting to and from airplanes. Because of space limitations airports cannot provide alternate routes for

people who do not wish to be subjected to uninvited persuasion.

As noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited attempts at persuasion. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *cf. Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 542 (1980). Inability of airport users to avoid uninvited persuasion therefore further distinguishes airports from traditional public fora like streets and parks.

III. BECAUSE AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA, FIRST AMENDMENT ACTIVITY MAY BE REASONABLY REGULATED TO PRESERVE THE AIR TRANSPORTATION PURPOSE OF AIRPORTS

As demonstrated above, airports have not traditionally been sites for nor do they have as a principal purpose the expression of ideas. Airports therefore do not constitute public fora. That airports are not public fora is wholly consistent with the holdings of this Court that government ownership of property does not automatically open up that property to the public for First Amendment expressive purposes. *United States v. Kokinda*, 110 S. Ct. 3115 (1990). As the Court stated in *Greer v. Spock*, 424 U.S. 828 (1976):

> [No principle exists] that whenever members of the public are permitted freely to visit a place

> owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.

Greer, 424 U.S. at 836. Moreover, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer*, 424 U.S. at 836 (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

Holding airports to be public fora, on the other hand, will unreasonably interfere with governments' ability to operate airports and all other government property for the purposes for which they are intended, causing airports and perhaps all other government property to "immediately . . . become Hyde Parks open to every would-be pamphleteer and politician." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1973); *see also Perry*, 460 U.S. at 49 n. 9.

Petitioners would have the Court overturn the Port Authority's regulation banning soliciting and leafleting because, they assert, time, place and manner restrictions can serve to protect the Port Authority's interests in operating its airport facilities. Petitioners confuse the possibility that time, place and manner restrictions *might* work at airports with the view that airports *must* be constrained from adopting any restrictions besides times, place and manner restrictions. This begs the question of forum analysis, which, this Court has held, must first be done to determine the appropriate level of scrutiny to apply to the airport's regulation. If the airport is not a public forum, then any reasonable regulation is allowed, even if other less restrictive regulations might also be workable. This Court has found that "the Government's

decision to restrict access to nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated." *Cornelius v. NAACP Defense & Educational Fund, Inc.*, 472 U.S. 788, 808 (1985).

"Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809. Thus, following, the recent decisions of this Court, the fact that the Petitioners find airports to be attractive places to solicit funds and distribute literature, and the possibility that lesser restrictions than a total ban on soliciting and leafleting on the airport might alleviate some of the airport's concerns, are not relevant factors if the Court determines, consistent with the analysis set forth in *Perry*, *Grace*, and *Kokinda*, that airports are not public fora. As operators of non-public fora, the airports would be given latitude to exercise their proprietary rights, as long as they are reasonable.

Airports should therefore be permitted to enact and enforce reasonable content neutral regulations, such as those adopted by the Port Authority, in order to safeguard airport premises for the air transportation purpose to which they are dedicated.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Second Circuit should be (i) reversed to the extent that it invalidates the Port Authority's regulation of distribution of literature; and (ii) affirmed to the extent that it upholds the Port Authority's regulation of in-person solicitation of money.

Respectfully submitted,

MICHAEL M. CONWAY*
THOMAS R. DEVINE
BRYAN S. ANDERSON
HOPKINS & SUTTER
Three First National Plaza
Suite 4300
Chicago, Illinois 60602
312/558-6600

Attorneys for Amicus Curiae
The Airports Association
Council International –
North America

Dated March 9, 1992

*Counsel of Record